The Central Law Journal.

ST. LOUIS, JUNE 13, 1890.

The denunciations with which some late important decisions of the Supreme Court of the United States have been met, at the hands of the public, is a fair illustration of the popular misapprehension as to the limitations of courts, as well as of the tendency of people to criticise their work, without reference to logic or reason. The decision, by the above court, of the so-called Minnesota "Granger" case caused the farmers of Minnesota and vicinity to have an attack of hysteria, during the paroxysms of which resolutions were adopted by one of their "Alliances," denouncing "the second Dred Scott decision" in unmeasured terms, and calling attention to the fact that "the citizens of England, from whom we have largely derived our form of government, would not permit for one instant a bench of judges to nullify an act of parliament." And these very people would be the first to complain if, as in England, there was no power in the courts to declare void a law interfering with their constitutional rights. For instance, suppose the legislation declared inoperative by the supreme court, instead of being a regulation of railroad rates, was, in effect, a law requiring a farmer to sell his wheat at whatever price might be fixed by State commissioners, with power to fix the price below the actual cost to the farmer, how would the English plan then suit the "Alliance?" Again, in the case of the "original package" decision, a number of persons comparing the conclusion arrived at by the court with their individual views of morality and expediency, have denounced the decision in unsparing terms. That the decision is subject to criticism from a legal stand-point, our views heretofore expressed will show. But reasoning founded on pure sentiment and expediency are not legitimate arguments before courts of law, and that even the Supreme Court of the United States is bound by constitutional restrictions, the people generally should be made to understand. Justice Miller, one of the ablest constitutional jurists that ever sat on the supreme bench, received a letter from a clergyman strongly criticising him for his concurrence in the judgment of the majority. The learned judge wrote a brief reply, in which he sets forth a view of the functions and obligations of supreme court judges, which evidently needs to be emphasized at the present juncture. Among other things he says:

> **Many people like you, I think, have the idea that the supreme court is only bound in its decisions by the views which they may have of abstract moral right. But we are as much sworn to decide according to the constitution of the United States as you are bound by your conscience to a faith in the Bible which you profess to follow. If my views on the true meaning of the constitution of the United States in a question before me as a judge of one of the courts of the country should compel me to differ from the whole world, I should do it as courageously as, I have no doubt, you would stand by any doctrine which you believe to be taught in the holy Bible. This is the only letter that I have attempted to answer on this subject, and however my friends may think that I erred on this subject, I must bear their censure. If I should believe everything which you believe on the subject of prohibition, I must still follow the constitution of the United States until it is changed by those who have authority to do so.**

As the *Albany Law Journal* properly remarks, many people have to learn that sentiment is not necessarily law.

If the opinion of Judge Benedict is well founded, congress will do well to go slow in the passage of the bill, now pending, providing for the reorganization of the federal courts. That gentleman has made a study of the bill, and in a letter to the *Brooklyn Union* criticises it, in more than one feature. In the first place he contends that there is no provision whatever in the bill for abolishing the present circuit courts, and for the appeal cases now pending in that court. He claims further that the bill provides for no effective process for the new circuit courts when organized, and has nothing to say as to the scope of judgment liens of that court. Now, the judgment of a circuit court of the district is a lien on real estate in the district and by statute throughout the State. Any one buying land in this district can go to the office of the clerk of the circuit court of this district and find out whether any judgment is a lien on it. But, he asks, how is it under the new system? Is it intended that the judgments of the circuit court shall be liens on real estate throughout the circuit? In that case no one could buy lands in Vermont or

Connecticut without sending to New York to have a search made for judgments of the circuit court. Or is it intended that the judgments shall be liens only in the district where the suit was begun? As a matter of fact the whole matter seems to have been entirely overlooked.

NOTES OF RECENT DECISIONS.

TAXATION — RAILROAD COMPANY — INTERSTATE COMMERCE.—The limitations upon the power of a State to impose taxes was considered by the Supreme Court of North Carolina, in Bain v. Richmond & D. Ry. Co., 11 S. E. Rep. 311, where it was held that under Const. U. S. art. 1, § 8, par. 3, authorizing congress to regulate commerce among the several States, the rolling stock of a foreign railroad company which is used in interstate commerce is not subject to taxation in North Carolina. Merrimon, C. J., says:

The power and right of the State to tax property of non-residents, whether these be natural or artificial persons, having its *situs* within the State for the purposes of business, convenience, or pleasure of the owners thereof or others, is too well settled to admit of serious question. This important right of the State is surely founded upon the just ground that such property has the protection, advantage, and benefit of the State; and it ought, on that account, to be required to contribute as taxes its fair share towards the support of the government whose benefits extend to it, not merely casually, but regularly and continuously, while it continues to be so located, as to other like property of residents of the State. Upon principles of common justice, every property owner should contribute to the support of the goverment that protects and renders his property valuable and useful his fair proportion of money as a consideration therefor, unless for some proper cause he is excused from doing so. Alvany v. Powell. 2 Jones, Eq. 51; Redmond v. Commissioners, 87 N. C. 122, and numerous cases there cited; Worth v. Commissioners, 90 N. C. 409; Ferry Co v. Pennsylvania, 114 U. S. 196, 5 Sup. Ct. Rep. 826; Thomson v. Railroad Co., 9 Wall. 579; Railroad Co. v. Peniston, 18 Wall. 5; Telegraph Co. v. Texas, 105 U. S. 460; Telegraph Co. v. Massachusetts, 125 U. S. 530, 8 Sup. Ct. Rep. 961; Leloup v. Port of Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380. If the State were absolutely sovereign in all respects, it might tax property coming into it temporarily from another State for the purposes of trade, or property passing across its territory from one State to another or other States in the course of trade, travel, and commerce. It might tax such trade and travel, in the discretion of its legislature. But as a member and constituent part of the federal Union, it does not possess unlimited powers of taxation as to all property, matters, and things that might otherwise be deemed and made subjects thereof. It and its authorities, including its courts of justice, are bound by that constitution; and it is its and their duty to observe, administer and enforce its provisions in proper cases and connections—as much so as its own constitution and laws. Indeed, the constitution of the United States is a part of the organic law of this State; and, in principle and theory, there is not, and cannot be, any conflict between the constitution and laws of the United States and the same of this State. If conflict, in fact, exists in any respect, as, unhappily, is sometimes the case, it is so because those who determine what the law is, administer and enforce it, are ignorant of or misapprehend its true meaning and application or willfully disregard and disobey it.

A leading and very important purpose of the federal Union was to establish and secure the freedom of trade and commerce, both foreign and domestic, and particularly, for the present purpose, between and among the several States comprising it. To this end, it is provided in its constitution (article 1, § 8, par. 3) that "the congress shall have power * * * to regulate commerce with foreign nations and among the several States, and with the Indian tribes." The power thus conferred is indefinite as to its scope, and capable of latitudinous interpretation and exercise, particularly as it is part of the organic law, and the subject to which it relates is one of great breadth and compass. It is difficult to determine its just limit in many respects; but it should receive a reasonable interpretation, such as will effectuate the purpose contemplated, trenching as little as practicable upon the powers, rights, and convenience of the States. Very certainly the provision implies that congress should regulate such commerce, and the States shall not; that congress shall do so effectually, in such way and by such means as will secure, promote, and encourage the same, and that the States shall not, if disposed to do so, interfere with, destroy, hinder, or delay the same, or divert it in any way, by any legal constraint, for their own advantage, otherwise than, to a very limited extent, as allowed by the constitution. Hence, it is settled that a State cannot tax commerce, trade, travel, transportation, or the privilege to carry on and conduct the same, or the vehicles, means, and appliances employed and used in connection therewith, coming into that State from another temporarily, however frequently, and returning to such other State; nor can it tax such commerce, or such incidents thereto, passing across it from another or other States to another or other States, however often this may be done. And the reason is that to so tax such commerce, and the incidents thereto, including such means of transportation, would tend directly, and have the effect, in a greater or less degree and extent, to interfere with the freedom of commerce among and between the people of the States. It would have the certain effect to embarrass, hinder, and delay the free course of such trade. If a State could thus tax such commerce at all, it might in its discretion, for its own benefit and advantage, tax it so heavily as to practically destroy it within its own borders, and in possible cases prevent it from passing freely into other States. Moreover, if one State might tax it, every State through which it passed might do so likewise; and thus the power of congress to regulate interstate trade and commerce would be nugatory, and a sheer mockery. It is clear that a State has no such power, and the Supreme Court of the United States has authoritatively so decided, directly and in effect in many cases. Hays v. Steamship Co., 17 How. 596; Morgan v. Parham, 16 Wall. 471; Ferry Co. v. Pennsylvania, 114 U. S. Rep. 196, 5 Sup. Ct. Rep.

826, and numerous cases there cited; Pickard v. Car Co., 117 U. S. 34, 6 Sup. Ct. Rep. 635; Leloup v. Port of Mobile, 127 U, S. 640, 8 Sup. Ct. Rep. 1380. The statute (acts N. C. 1887, ch. 137, §§ 44-51) properly interpreted, does not, and was not intended to, embrace and tax the property of the defendent put in question by this appeal. It had reference to, and embraced property of, corporations, whether resident or not, whose property was situated—had a *situs*—in this State, and was thus subject to be taxed. But the property in question was not, in a legal sense, located —situated—in this State. It had no *situs* here. It was the property of a non-resident corporation, employed and used by it, constantly, for the purposes of transportation, in the course of the conduct of interstate trade and commerce coming in and passing across this State, from another and other States to and into other States. It was not stationary, but constantly *in transitu* from one State to another.

HUSBAND AND WIFE — SEPARATION AND MAINTENANCE.—The new Supreme Court of South Dakota is already beginning to make itself known. Among one of the knotty problems lately presented to it was whether a wife, justified by her husband's misconduct towards her, in living separate from him, may maintain an independent action against him for her support, without regard to the question of divorce. This question arose in the case of Bueter v. Bueter, 45 N. W. Rep. 208. After an exhaustive consideration of the authorities, the court decided in the affirmative. Kellam, J., says:

Both at common law and under our statute the wife is entitled, by virtue of the marriage contract, to support and maintenance from her husband, and he, in turn, is under obligation to supply such support and maintenance, commensurate with his ability, until relieved from such duty, either by the law, or by the voluntary act of the parties to the contract. Section 2588, Comp. Laws. But while this mutual and correlative duty and right, as between husband and wife, have been recognized by the courts from early day, it was never in the English courts, I think, not even the ecclesiastical, allowed as an independent right or cause of action. It was only asserted and allowed as an incident or appendage to some other proceeding, generally for a divorce. In Ball v. Montgomery, 2 Ves. Jr. 191, Lord Loughborough said: "I take it to be now the established law that no court, not even the ecclesiastical court, has any original jurisdiction to give a wife a separate maintenance. It is always as incidental to some other matter that she becomes entitled to a separate provision;" and this was probably the nearly uniform holding of the English courts, except that upon *supplicavit* for security of the peace, against her husband, it was said, in the case just cited, the wife might be allowed a separate maintenance, if necessary that she should live apart from her husband; but even this authority was questioned in subsequent cases, and it is very doubtful, if not altogether improbable, that a case like the one at bar could have been maintained in any of the courts of England. In Bishop on Marriage and Divorce, the author declares that the doctrine and practice of the English courts were strongly against it, and to the same purpose is the declaration of Judge Story in the second volume of his Equity Jurisprudence, § 1422.

An examination of the earlier American cases shows a strong disposition to follow the same rule, but it did not command universal obedience. In an early Virginia case (Purcell v. Purcell, 4 Hen. & M. 507), a broader jurisdiction was asserted; and it was there held that if a husband abandon his wife, and separate himself from her, without any reasonable support, a court of equity may, in all cases, decree her a suitable maintenance and support out of his estate, upon the very ground that there is no adequate or sufficient remedy at law in such a case. Mr. Bishop speaks disapprovingly of the chancellor's conclusion as to the jurisdiction of a court of equity in such a case, but Judge Story says of it: "There is so much good sense and reason in this doctrine that it might be wished it were generally adopted." Story, Eq. Jur. § 1423*a*. The same doctrine was again recognized and maintained in Virginia in Almond v. Almond, 4 Rand. (Va.) 662. In South Carolina the same rule as to the jurisdiction of a court of equity is asserted in Prather v. Prather, 4 Desaus. Eq. 33; and later, in the same State, in Rhame v. Rhame, 1 McCord, Eq. 197. In Alabama the rule is broadly stated, in Glover v. Glover, 16 Ala. 440, to be: "Where a husband abandons his wife without just cause, and casts her upon society destitute of the means of subsistence, a court of chancery, as an original ground of equity, will entertain a bill filed against him for alimony;" and this case was followed in Kinsey v. Kinsey, 37 Ala. 393. In Butler v. Butler, 4 Litt. (Ky.) 202, this question was elaborately reviewed, and in his opinion Judge Mills says: "Suppose the case of abandonment by the husband, and that the separation is complete, without any sentence, and that the wife is left to the humanity of the world, without support, has the chancellor, without the statute, or in cases not embraced by it, no authority to direct a portion of the husband's estate to be set apart for the support of the wife, leaving the marriage contract as obligatory as ever? This is a question different from the power of separation and deserves further consideration. * * * It is clear that strong moral obligations must lie on every husband, who has abandoned his wife, to support her. The marriage contract and every principle binds him to this. To fail to do it is a wrong acknowledged at common law, though that law knows no remedy, because there the wife cannot sue the husband. But in equity the wife can sue the husband, and it is the province of a court of equity to afford remedy where conscience and law acknowledged a right, but know no remedy."

In 1869 this precise question was before the Supreme Court of California, in Gallard v. Gallard, 38 Cal. 265; and, though the case was decided by a divided court, Judge Crockett, in the prevailing opinion, says: "Whatever reason may have prevailed at common law, to induce the courts to withhold their aid from the wife under these circumstances, [separation and destitution,] none exists in this State why a court of equity should refuse to compel an offending husband to provide out of their common property for the support of an ill-used wife, who has been forced to seek protection elsewhere than under the husband's roof." Again, in Garland v. Garland, 50 Miss. 694, after a very through examination of this question, and the cases bearing upon it, the court in its opinion uses this language: "Courts of equity in America will always interpose to redress wrongs when the complainant is without full, adequate, and complete remedy at law. Here there is no such process as *supplicavit*, nor a distinct proceeding for the restitution of the conjugal

relation. If a wife is abandoned by her husband without means of support, a bill in equity will lie to compel the husband to support the wife without asking for a decree of divorce." In the case of Graves v. Graves, reported in 36 Iowa, 310, Judge Cole, delivering the opinion of the court, states the question thus: "The main question involved in the controversy is whether a court of equity has the authority or jurisdiction to entertain an action brought for alimony alone, and to grant such alimony where no divorce or other relief is sought." And after an examination of the question, and the history of its treatment by the courts, both in England and America, he concludes: "It seems to us that, upon well-settled equity principles, as well as upon considerations of public policy, the action may be maintained without asking a divorce or other relief." And very recently this distinct question was presented to the Supreme Court of Nebraska in Earle v. Earle, reported in 43 N. W. Rep. 118. In that case, as in Galland v. Galland, *supra*, it was contended—and the appellant so insists in this case—that the statute affirmatively authorizing alimony and support to the wife, as an incident or appendage to divorce proceedings, impliedly negatives the power or jurisdiction of the court to make such allowance in other cases, but in neither case was such argument convincing. The syllabus of this case, prepared by the court, says: "The law of the land having made it the legal duty of a husband to support his wife and children, courts of equity within this State have the power, in a suit by the wife for alimony and support, to enforce the discharge of such duty, without reference to whether the action is for a divorce or not."

These cases, while possibly not strictly in line with the prevailing current of judicial decisions, either in England or in this country, commend themselves to our judgment. Their reasoning seems to us logical and safe, and their conclusions in harmony with the present legal *status* of married women. A denial of such jurisdiction would seem to expose the law and the courts to the just criticism of having squarely asserted the wife's right to support from her husband, yet denying her a remedy when such support is refused. * * * Marriage being the result of a civil contract between the parties, and the law positively declaring that such contract covers and imposes the obligation of support, we are unable to perceive on any principle of reason or justice, why a wife who agrees to separate from her husband should be more favored by the law than one who clings to him in spite of his ill-usage, until aged in years, infirm in body, and broken in spirit, she is finally driven from her home by his unbearable misconduct. It is no adequate response to say that the law makes the husband liable for necessaries which may be furnished the discarded wife under such circumstances. What if no tradesman would furnish such supplies, and take the risk of collecting against her husband? It would be extremely improbable that any wife could long maintain herself in that way. Such a support would be too uncertain, precarious, and humiliating. It neither meets the rights of the wife, nor the duties of the husband. It is equally unfair, unjust, and inequitable to tell the destitute, and possibly unoffending wife that the law will compel her husband to provide for her if she will couple her application for maintenance with a complaint for divorce. There may be abundant reasons, controlling with her, and which the law ought to respect, why she does not want a divorce. There may be objections in conscience,—a vital and unyielding principle and rule of her religion. She may unselfishly desire to avoid a public notoriety and scandal that would involve her children, or she may still have such affection for, and faith in, her husband as will feed the hope of his reformation and their reconciliation,—reasons, all of them, which the law ought not to ignore or disrespect. The husband owing this duty of maintenance to the wife, we perceive no good reason why she may not, independent of any other ground, maintain an action against him for its enforcement.

CRIMINAL TRIAL—DUTY OF PROSECUTOR—WITNESS. — Prosecuting attorneys will find some suggestions of value in Keller v. State, 23 N. E. Rep. 1138, decided by the Supreme Court of Indiana. In holding that the prosecution need not examine as witnesses every person who saw the crime committed, Judge Elliott says:

Under the rigorous and harsh rules of the old common law, there was reason for compelling the prosecution to call and examine as witnesses all persons who had knowledge of material facts connected with the crime charged against an accused person. That law denied him counsel, and sealed his lips as a witness. Our law not only allows him to employ counsel, but employs counsel for him when he is too poor to employ counsel himself. Our law makes him a witness in his own behalf, and affords him liberal facilities for obtaining witnesses. The reason which supported the common-law rule compelling the crown to call witnesses utterly fails under our system; and, where the reason fails, so also does the rule. If the question were an open one, we should decline to follow the ancient rule of the English courts since the reason which was its life does does not exist in our State. The question is not an open one. Our court has not only held that the prosecution is not bound to call witnesses at the instance of the accused, but it has gone further; for it has held that an accused can only cross-examine the witnesses of the State as to matters brought out on the examinations in chief. If the accused desires to elicit new matter he must make the witness his own. In Haymond v. Saucer, 84 Ind. 3, it is said: "The failure to produce a witnesss who might as well be called by the one party as the other is no reason for indulging a presumption against either party." A similar doctrine was asserted in Coleman v. State, 111 Ind. 563, 13 N. E. Rep. 100. But we need not invoke the aid of analogous cases, for we have a decision directly in point. We refer to the case of Winsett v. State, 67 Ind. 26, where it is said, in answer to the appellant's contention that it was the duty of the State's attorney to produce all the witnesses to the transaction, that "we may remark, however that the law of this State, in our opinion, imposes no such duty on the State's attorney." The decision of our court is sustained by well-reasoned cases. State v. Martin, 2 Ired. 101—120; State v. Smallwood, 75 N. C. 104; State v. Kilgore, 70 Mo, 546; State v. Eaton, 75 Mo. 586. It is proper to say that at common law all felonies were punishable capitally at the time the rule to which we have refered was adopted, and that the rule was held not to apply in prosecutions for misdemeanors. In the case of U. S. v. Butler, 1 Hughes (U. S.), 457-466, Chief Justice Waite, who presided at the trial, said, in answer to a request of the counsel of the defendants to compel the prosecutor to name the witnesses, that "there was no practice jus-

tifying such a demand." We think this is clearly correct, under our laws, in all cases.

We do not not mean to intimate that it is the right or the duty of a prosecutor to conceal the names of witnesses from the accused, or in any way to hinder him in obtaining material and relevant testimony. On the contrary, we believe that it is the duty of the officer representing the State to refrain from doing any act that will deprive the accused of a fair trial. The State does not desire that any citizen shall be deprived of evidence tending to exhibit the truth, and its officers will be guilty of an unpardonable breach of duty if they corruptly conceal or suppress evidence of a material and relevant character. But it by no means follows from this that the prosecuting attorney must, at the dictation of the accused, call such witnesses as he names. If he desires the testimony of the witnesses, he must call them. All he has a right to ask is that the prosecuting attorney shall refrain from doing anything that will tend to deprive him of testimony to which he is rightfully entitled.

STREET RAILWAY COMPANIES — FRANCHISE —ELECTRICITY AS MOTIVE POWER. — Some recent cases have considered the question, of practical interest in many of the cities, as to the right of a street railway company to substitute electricity for horse-power. In Taggart v. Newport Street Ry. Co., 19 Atl. Rep. 326, decided by the Supreme Court of Rhode Island, it was held that an act incorporating a street railway company, one section of which requires notice to abutting property owners, by publication, before the location of tracks proposed to be laid, there being another section relating to the power authorized to be used, does not require the notice of the location to set forth the power proposed to be used. Where the act provides that the "tracks or road shall be operated and used by said corporation with steam, horse, or other power, as the city council may from time to time direct," the city may, after notice has been given, and an ordinance passed permitting the use of horse-power, pass a second ordinance, without further notice, changing the power to electricity. The fact that the word "steam," so used, must be stricken out, because it cannot be legally used, does not make the words "other power" refer to other animal power, and exclude electricity. The power conferred on the city council to authorize the use of electricity as a motive power carries with it the power to authorize the erection of poles on the edge of the sidewalk, notwithstanding the act of incorporation provides that "said corporation shall not incumber any portion of the streets occupied by said tracks;" such poles not being an incumbrance, but a necessity for the successful operation of the road. The change of the power by which a street railway is operated from horse-power to electricity, and the erection of poles necessary for its operation, does not impose an additional burden on the abutting property owners.

In Hudson River Tel. Co. v. Waterliet Turnpike & R. Co., 9 N. Y. Supp. 177, decided by the Supreme Court of New York, it was held that Laws N. Y. 1862, ch. 233, which authorized defendant to operate a street railroad in the streets of Albany, and to use "the power of horses, animals, or any mechanical or other power, or the combination of them," embraced electricity as a motive power.

SOME NATURAL GAS CASES.

In State ex rel, Corwin v. The Indiana and Ohio Oil, Gas and Mining Company[1] was decided a case of some interest to Natural Gas Companies and their patrons. The legislature enacted a statute which absolutely prohibited the exportation of natural gas beyond the boundaries of the State. From a self-interest stand-point the object of the statute was a very laudable one.

The court, in a very able opinion, written by ELLIOTT, J., held the act unconstitutional, on the ground that it was an undue interference with commerce between the States. Said the court: "The appellee's counsel contend that the act of March 9th, 1889, is invalid, because it is interstate commerce legislation, and such legislation must be federal. In order to give any force to this contention it is necessary to determine at the outset whether natural gas can be considered an article of commerce. With this preliminary question we have but little difficulty. Natural gas is as much an article of commerce as iron ore, coal, petroleum or any other of the like productions of the earth. It is a commodity which may be transported, and it is an article which may be bought and sold in the markets of the country. The gas in the earth may not be a commercial commodity, but, when

[1] 120 Ind. 575, 22 N. E. Rep. 778.
[2] 18 Atl. Rep. 724.

brought to the surface and placed in pipes for transportation it must assume that character as completely as coal on the cars or petroleum in the tank."

The question was involved in the case of the Westmoreland Natural Gas Company v. DeWitt et al.,[2] decided recently by the Supreme Court of Pennsylvania, whether the possession of certain gas on leased land went with the possession of the land. The complainants had put down a well which had tapped the gas-bearing strata, and it was the only one on the land. They had it in their control, having only to turn on a valve to have it flow into their pipes for ready use. The court held that the fact that they did not keep it flowing, but held it generally in reserve, did not affect their possession any more than a mill-owner affects the continuance of his water rights when he shuts down the sluice-gates.

The case of James Carothers v. The Philadelphia Company[3] presents an interesting question in natural gas litigation. The company was organized under several acts of the legislature, passed long before natural gas came into general use. Under an act of 1870 it was authorized "to build, maintain or manage in any way that said parties or any of them have authority to do, any work or works, public or private, which may tend or be designed to improve, increase, facilitate or develop trade, travel or the transportation and conveyance of freight, live-stock, passengers and other traffic by land or water, from, or to any part of the United States or the territories thereof; * * and also to purchase, erect, construct, maintain or conduct in its own name and for its own benefit, or otherwise, any such work, public or private, as they may by law be authorized to do." It was also invested with power to "enter upon and occupy the lands of individuals or companies on making payment therefor or giving security according to law." It is very clear that the kind of transportation the legislature had in mind when it enacted the law was that by rail or water.

The company engaged in the transportation of natural gas from Murraysville to Pittsburg, in the same State, by the use of pipes laid beneath the surface of the ground. It supplied gas for fuel to several hundred manufacturing establishments and several thousand dwellings, and owned one hundred and fifteen wells. It had thirteen pipe lines running from these wells to the city, one of which passed through the land of Carothers. He sought to enjoin its use upon the ground that the company's charter did not confer upon it the right of eminent domain for the conveyance of natural gas; and that if it did confer such right, it was unconstitutional, because it attempted to authorize the taking of private property for private use, and because no mode was provided for the assessment of damages. The three claims of the petitioner were denied. In discussing the case the supreme court said: "If the company has the right to engage in this business under its act of incorporation, it has the right of eminent domain under the same act. If the act of incorporation does not authorize it, then, as to this business, it is a private association, and without the power to enter upon the plaintiff's lands. The master and the court below held that the company was authorized to enter in its corporate character upon this business, and rested this conclusion upon the proposition that gas is freight, and that conducting it through pipes from wells to the consumer is the transportion of freight. But a transportation company provides simply the means for transportation of freight for customers at certain prices. This company produces a commodity which it takes to market and sells. The gas is produced at the wells. It is wanted at the mills and dwellings of the city. The pipe-lines laid by this company were to convey the gas from its wells to its own customers, to whom it is sold and delivered. The transportation is incident to the production and supply of the gas. The situation is precisely the same as in the case of illuminating gas, which is manufactured, stored and conveyed by pipes to the place of consumption. The business is that of making and supplying gas for light. The transportation to the customers is incidental. The same is also true of water companies. They produce, store and supply to customers, water. Transportation by means of pipes is the means of delivery, and is a mere incident of the business. The business of the Philadelphia company is, in our opinion, that of a fuel-gas company, viz.: the production and distribution of natural gas; and the transportation

[3] 118 Pa. St. 468.

portation of the gas is the necessary means of delivery to its customers and nothing more."

An act of the legislature of 1885, declared that natural gas had become a "prime necessity for use as a fuel and otherwise in the development of trade." The court asked this question: "Had it the power to engage in this business in 1884?" It then adds that: "It will be seen by our analysis of the grant in the act of incorporation that the company had the power to build, etc,, any work, public or private, which 'may tend or be designed to improve, increase, facilitate or develop trade.' "[4]

In 1874, a statute was enacted in Pennsylvania, authorizing the formation of companies for "the manufacture and supply of gas, or the supply of light or heat to the public by any other means." It was also provided that "companies incorporated under the provision of this statute for the supply of water to the public, or for the manufacture and supply of gas, or the supply of light or heat to the public by any other means shall, unless otherwise provided by this act, from the date of the letters patent creating the same, have the powers and are governed, managed and controlled as follows: Where any such company shall be incorporated as a gas company, or company for the supply of heat or light to the public, it shall have authority to supply with gas-light the borough, town, city or district where it may be located, and such person, partnership and corporation residing therein or adjacent thereto as may desire the same at such price as may be agreed upon, and also to make, erect and maintain therein the necessary buildings, machinery and apparatus for manufacturing gas, heat or light from coal or other material, and distributing the same," with the right to enter upon the streets to lay pipes and mains.

The Fuel Gas Company was formed under this act, it being declared in its articles of incorporation that: "The purpose for which it is formed is the supply of heat to the public from gas within the city of Pittsburg." The Penn Fuel Company was formed under the same act, having the following clause in its articles: "Said corporation is formed for the purpose of supplying heat to the public within the city of Pittsburg by means of natural gas conveyed from such adjoining counties as may be convenient."

The statute we have already quoted, provided that "no other company shall be incorporated for that purpose until" the charter of the first company had expired, five years being the limit which it could at the farthest run. The Fuel Gas Company was formed first, and it claimed the exclusive right to the streets, excluding the Penn Fuel Company; its claim was denied.

"The Fuel Gas Company," said the court, "is authorized 'to supply heat to the public from gas within the city of Pittsburg.' The thing to be supplied is 'heat,' the means of supplying it are 'from gas within the city of Pittsburg.' Read literally and strictly these words import that the gas used must be produced within the city of Pittsburg. No authority is given to obtain it from without the city limits and the direct and natural meaning of the words in the collocation in which they are placed is that the heat to be supplied must be from gas within the city. If this company should go into an adjoining county to obtain its gas it might well be asked as to the source of its authority to do so, and the best reply it could make would be the quite doubtful authority contained in the words above quoted. But passing this question, it is very certain that this company may furnish heat produced from any kind of gas, manufactured or natural. There is no limit or restraint put upon it as to the kind of gas it may use, and hence any kind of manufactured gas, and any species of natural gas, may be used in producing the heat which it is authorized to furnish.

Turning, now, to the description of the franchise of the Penn Fuel Company, we find it to be of a radically different character. It is very clear that this company cannot use any kind of manufactured gas, but is limited to natural gas alone, as the fuel which it may

[4] For the manner of assessment of charges for a right of way under the act of 1885, see Penn. Natural Gas Co. v. Cook, 123 Pa. St. 170. The public authorities decline to grant a certificate of incorporation to a natural gas company asking for the right to exercise the power of eminent domain in another State, under the act of 1885: United Natural Gas Co., 1 Pa. C. C. 468. Touching the practice under the Pennsylvania act of 1885, see McDevitt v. People's Natural Gas Co., 6 Cent. Rep. 885, 7 Atl. Rep. 588. An oil pipe line is a transportation company: Columbia Conduit Co. v. Commonwealth, 90 Pa. St. 307; West Virginia Transportation Co. v. Volcanic Oil, etc. Co., 5 W. Va. 382.

employ in providing heat. In addition to this it must be natural gas conveyed from convenient adjoining counties. In designating a particular source from which its gas must be derived all other sources are excluded, and it follows that this company must go outside the limits of Pittsburg to obtain its gas. So that it follows that the Fuel Gas Company has a franchise to furnish heat produced from any kind of gas within the city of Pittsburg, and the Penn Fuel Company has a franchise to furnish heat produced from natural gas alone and obtained from adjoining counties." "These two franchises are not identical, and therefore, not necessarily hostile to each other. The prohibitive language of the statute is, 'and no other company shall be incorporated for that purpose until,' etc.; that is, for the same purpose which is covered by the franchise first granted." * * *

Speaking of the powers of the Natural Gas Company conferred by the statute set out at length above, the court said: "It seems to be plain that the words of this section contemplates and authorizes the creation of a corporation for the manufacture and supply of gas, and the supply of light and heat by any other means. Of course the only kind of gas companies that are authorized are those which manufacture gas, and this necessarily excludes corporations for supplying natural gas, that being a product of nature, and not the result of any manufacturing powers. The other companies authorized are those for supplying light or heat produced by any other means. If the respondents in this suit did actually furnish heat, they could contend with great force that the largeness of expression, 'by any other means' included natural gas as one of those means. It is not easy to see that such contention could be resisted, unless by considering the language immediately following. The language confers the right to make, erect and maintain 'the necessary buildings, machinery and apparatus for manufacturing gas, heat or light from coal or other material and distributing the same.' These words import, literally, an intent that the light or heat which is supplied shall be manufactured from gas or coal or other material. Regarding the statue as a whole we feel obliged to hold that whether the article furnished be gas or light or heat, it must be the result of a manufacturing process. That is, if gas is furnished, it must be manufactured; if light or heat is furnished it also must be manufactured. Nor is this inconsistent with the language of the section which speaks of the 'supply of light or heat by any other means.' For neither light nor heat can be produced by any human agency, except by some species of manufacture." [5]

Farther along, in a supplemental opinion, the court declines "to regard a gas well as a mine or a quarry, or natural gas as a mineral substance, to be mined or quarried and prepared for market, within any conceivable meaning to be imputed to the legislature which passed this act. At that time natural gas was unknown as a fuel, but had it been perfectly well known it would have required far more precise and specific words than these to authorize the formation of companies for supplying it.[6] It had been decided, however, previous to this case, by a common pleas court that a charter authorizing the formation of a corporation for the "manufacture and supply of gas for fuel heat," included power to supply natural gas for that purpose; and a subsequent company

[5] The court refer to the statute on mining and manufacturing: Emerson v. Commonwealth, 108 Pa. St. 111, 15 W. C. N. 425, 42 Leg. Int. 81, reversing 41 Leg. Int. 185. This act was held to authorize the incorporation of companies to furnish electric light: Wilkes-Barre Electric Light Co. v. Wilkes-Barre Light, etc. Co., 4 Luzerne Leg. Reg. Rep. 47. The question of monopoly was also considered. See Electric Lighting Co. v. Underground Electric Light, etc. Co., 16 W. N. Cas. 407. The act of 1885 forbids a city to grant the exclusive right to a gas company to use its streets, and an ordinance attempting to give such privileges is void. So where one company had the privilege to lay pipes under the streets, and the city refused to allow another company to cross its three principal streets, to the company's great loss and damages, it was held that an injunction should be issued to restrain the city from interfering with the company's crossing the streets: People's Natural Gas Co. v. Pittsburgh, 1 Pa. C. C. 311. A different view was taken of this act in Meadville Natural Gas Co. v. Meadville Fuel Gas Co., 1 Pa. C. C. 448. By ordinance the city granted to a company the right to lay pipes in the street, requiring the work to be begun at a fixed time, and the gas to be introduced within fifteen months, and provided that "no other privilege shall be given by the city authorities for a similar purpose for a period of two years from the date of its passage." Large sums were expended in prosecuting the work. The court, however, held the grant void. Appeal of Meadville Fuel Gas Co., 4 Atl. Rep. 733, 3 Cent. Rep. 921. See Citizens' Gas Co. v. Elwood, 114 Ind. 332.

[6] Erie Mining, etc. Co. v. Gas Fuel Co., 15 W. N. C. 399. In Ohio, a statute passed long before the discovery of natural gas, regulating gas companies, was held applicable to natural gas companies: Gas Light & Coke Co. v. Avondale, 1 West. Rep. 91.

organized for "supplying light and heat by means of natural gas" could claim an exclusive right to supply natural gas within the city.[7]

By the Pennsylvania act of 1885, a natural gas company is authorized to produce and supply natural gas for either light or heat; the transportation of such gas is declared to be "a public use," and the powers of eminent domain, both within the city and without, is given. It contains a provision to the effect that "the right to enter upon any public lane, street or highway for the purpose of laying down pipes, altering, inspecting or repairing the same" shall be "subject to such regulations as the council of any city may by ordinance adopt." Another provision declares that such companies "shall not enter upon or lay down their pipes or condicts on any street or highway of any borough or city, * * * without the assent of the councils of such borough or city by ordinance duly passed and approved." Another clause provides that the act shall not "be so construed as to confer, authorize or give color to any claim of exclusive right in any corporation however formed, dealing in any way or for any purpose in natural gas."

Of these provisions it was said: "So far as the limited authority to legislate on these peculiar subjects has been delegated to councils, and to that extent only, can the corporate powers, rights and privileges of natural gas companies be qualified or limited. Councils are authorized to give or withhold their assent, without more. They have no right to couple their assent with any condition or restriction not imposed by the act, unless the company agree to accept the same and be bound thereby; and even then, the conditions or restrictions, so accepted by the company, must harmonize and be in nowise in conflict with the provisions of the act. The assent of the company being given, the regulations they are authorized to adopt are such only as relate to the manner of laying pipes, altering, inspecting and repairing the same, and the character thereof, with respect to safety and public convenience. These regulations must also be reasonable and not in conflict with any of the provisions of the act."

Where a natural gas company had been incorporated under a law that did not authorize the incorporation of such a company, and under it had begun to supply natural gas within a city, and had laid pipes therein—having supplied one mill within the city, it was held to be within the provisions of an act subsequently enacted, authorizing the incorporation of such a company, and providing that such a company could accept the provisions of such subsequent act, and organize thereunder, and that the provison of the act should not apply to a corporation accepting it, which "had to some extent prior to the passage" "begun supplying natural gas within such city, borough, or had laid pipes for such purpose therein."[8] But a city cannot sustain a bill for perpetual injunction, against a natural gas fuel company, organized under such act, on the ground that the corporation has laid its pipes in the streets without permission, and that such pipes are defective, and cause injury to the persons and property and citizens—where the averments of the bill are denied, and the court upon examination finds the matter complained of is not a public nuisance.

In Johnston's appeal[9] it was claimed that an act allowing a natural gas company the right of eminent domain was invalid, because its use was a public one. This claim, however, the court denied, saying: "It is a serious objection to set up against the act of May 29, 1885, in view of the present consumption of gas, that its use is not a public one, and that, therefore, those corporations which are engaged in its transportation may not be vested with the right of eminent domain. As well might this objection be urged against the vesting of this power in those companies which have been incorporated for the purpose of supplying our towns and villages with water, in which the public interest is found, not in the transportation, but in the use of that fluid after it has, by those agencies, been transported. Nor would it seem to us as of the slightest materiality that the water there produced had been drawn from a single spring, well or basin. Just so with natural gas. It has become a public

[7] Appeal of the City of Pittsburg, 115 Pa. St. 4.

[8] Borough of Butler v. Butler Gas Co., 5 Cent. Rep. 669, 6 Atl. Rep. 708. After a refusal of a preliminary restraining order, the passage of an ordinance regulating the use of natural gas will not entitle them to file a supplemental bill. *Id.*

[9] 5 Cent. Rep. 564, 7 Atl. Rep. 167.

XUM

necessity; but, as it cannot be used except it be piped to the manufacturer and residences of people, it follows that, as the piping of it is necessary to its use, the means so used for its transportation must be of prime importance to the public, and directly affect its welfare."

In Bloomfield and Roberts' Natural Gas Light Company v. Richardson,[10] a natural gas company was held to be a public corporation, that its object was of such a public nature that the right of eminent domain could be conferred upon it, and it could be authorized to lay its pipes under the surface of a public highway in the country, upon the payment to the adjoining land owner his damages caused thereby. Whether laying the pipes in a city, with the consent of the city council, would entitle the adjacent land owner to damages, was alluded to, but not decided. The company was likened to an artificial gas company, or a water-works company, both being public in their nature; and the fact that the company only sold the gas when it reached the city did not make it a private company.

In the case of the same Company v. Calkins,[11] it was held that the pipes could not be laid in a country highway without the consent of the adjacent land owner, or the right acquired by proceedings for that purpose, upon paying compensation therefor; and that it may be shown what would be the effect of gas escaping upon vegetation where it ran through a farm. Upon appeal, this case was affirmed, a like *quaere* being made with respect to streets in a city or town.[12]

An act outhorizing the incorporation of a natural gas company provided "that neither this act nor any other should be so construed as to confer, authorize or give color to any claim of exclusive right in any corporation, however formed, dealing in any way, or for any purpose in natural gas." The power of eminent domain was given, the right to consolidate, with the consent of the chief executive of the State, after the reasons therefor had been submitted to and approved by him. The use of natural gas for fuel was declared to be a "prime necessity," and its transportation and supply a "public use." The object for which such companies were formed was declared by the statute to be "for the purpose of producing, dealing in, transporting, storing and supplying natural gas to such persons, corporations or associations within convenient connecting distance of its line of pipes, as may desire to use the same, upon such terms and under such regulations as the gas company shall establish." It was held, under these provisions, that the court would grant a preliminary injunction upon a bill, supported by affidavit, alleging that a natural gas company, incorporated under the act, after furnishing gas at a reasonable price, with assurance of continuance, secured a monopoly by terms made with competing companies, demanded excessive rates, and threatened to shut off the gas unless the increased rates were paid. The clause "upon such terms and reasonable regulations as the gas company shall establish," was held to rather impose a duty than confer unlimited power.[13] In the common pleas court of Mahoning county, Ohio, it was held that an injunction would be granted to restrain a company laying its pipes in the streets of a town, even though the town had granted permission to it so to do, in order that it might convey natural gas to the abutting land owners. The laying of such pipes was held to be an additional burden and servitude upon the fee.[14] In the Jefferson common pleas court it was sought by the owners of a coal mine to enjoin the owner of the surface from boring a gas well through their strata of coal, on the ground that it was a trespass attended with great danger to the lives of the miners and property of the mine, owing to the fact that the gas could not be controlled. This was in 1885. The court at first denied an injunction, upon the ground that the act of the defendant would be a mere trespass, for which an adequate remedy was afforded in an action at law. But on the succeeding day the court, at the trial, reversed its former ruling, placing it chiefly upon the probable danger of driving a gas well through a mine, although it was the court's opinion that it would be some day possible to dig such a well in such a place. The court also held that the surface owner had no right of way of necessity through

[10] 63 Barb. 437.

[11] 1 T. & C. (N. Y.) 549.

[12] Bloomfield, etc. Co. v. Calkins, 62 N. Y. 386. This case was followed in Sterling's Appeal, 111 Pa. St. 35.

[13] Waddington v. Allegheny Heating Co., 6 Pa. C. C. 96; Sewickley v. Ohio Valley Gas Co., *Id.* 99.

[14] Webb v. Ohio Gas Fuel Co., 16 W. L. Bull. 121.

the vein of coal to his land beneath it, a reservation of such a way not having been made.[15]

"Oil" is not synonomous with "gas;" and a lease of property declaring that the leased property "shall be occupied and worked for petroleum, rock or carbon oil, and shall not be occupied or used for any other purpose whatsoever; and "if no oil is found in paying quantities within four years from this date, this lease shall be null and void," is not kept in force by the discovery of natural gas.[16] But where a lease was given, granting the privilege to mine and excavate for petroleum, rock or carbon oil, "or other volatile substance," the court declined to decide whether or not natural gas was a "volatile substance," because the words, "volatile substance," "have no well defined meaning; they create an ambiguity, and their construction becomes a marked question of law and fact, in which the court, and if necessary, a jury, must have the aid of scientific men."[17]

One undertaking to drill a gas well, to a certain depth and of a certain size must comply literally with the contract, even though no gas be found and a well of a smaller bore is just as effective in determining that no gas can be found there at that depth.[18]

Natural gas companies are liable as any other conporations for their negligence. Thus, where a company laid its pipes on a river bottom, so that it interfered with navigation, it was held to be an unlawful obstruction of the river; for the pipes should have been placed beneath its bed.[19] In an action against a gas company for negligence it is not error to charge the jury that the plaintiff, in using gas from a high-pressure line, assumed only the usual and ordinary risks of such use, and not those risks which become extraordinary through the negligence of the defendant.[20] The Pennsylvania act of 1885, provides: "That any company laying a pipe line under the provision hereof shall be liable for all damages occasioned by reason of the negligence of such gas company." Where an injury was inflicted by reason of the negligence of an independent contractor, and occurred before the acceptance by the gas company of the work, it was held that such company was not liable, even though it accepted the work, after the injury, with notice of the defect.[21] An employee of a company sued it to recover injuries suffered from an explosion. The company, when the accident occurred, was laying pipes in a street, and to test that laid, it inserted a plug in the end of a pipe and turned on full pressure. This was the usual way; and the test was made under the direction of one having great experince and capacity in such business. The plaintiff was employed about twenty feet from the end of the pipe. A slight escape of gas took place when the test was made. A fellow-workman of the plaintiff struck a match to light his pipe, and there was an explosion, by which the injury was inflicted. It was held that the injury was caused by a clear act of negligence of the fellow-workman, and this was alone sufficient to prevent a recovery by the plaintiff.[22]

W. W. THORNTON.

Indianapolis, Ind.

[15] Jefferson Iron Works v. Gill Bros., 14 W. L. Bull. 2.

[16] Truby v. Palmer, 4 Cent. Rep. 925, 6 Atl. Rep. 74. See also where gas was discovered under an oil lease: Eaton v. Wilcox, 42 Hun, 61.

[17] Ford v. Buchanan, 111 Pa. St. 31.

[18] Gillespie Tool Co. v. Wilson, 123 Pa. St. 19. Touching a failure to comply with the terms of an oil lease, see Galey Bros. v. Kellerman, 123 Pa. St. 491; Washington Natural Gas Co. v. Johnson, 123 Pa. St. 576.

[19] Omslaer v. Philadelphia Co., 31 Fed. Rep. 354.

[20] Oil City Fuel, etc. Co. v. Boundy, 122 Pa. St. 449.

[21] Chartiers Valley Gas Co. v. Waters, 123 Pa. St. 220.

[22] Allegheny Heating Co. v. Rohan, 3 Pa. Sup. Ct. Dig. 1 (1888). An injunction may usually issue to prevent illegal interference with flowing gas wells used to supply the public. Citizens' Natural Gas Co. v. Shenango Natural Gas Co., 7 Pa. C. C. 277.

FELLOW-SERVANTS.

LOUISVILLE, ETC. CO. V. PETTY.

Supreme Court of Mississippi, March 10, 1890.

Fellow-servants—Sand-box on Engine.—The employee of a railroad company, whose duty it is to fill the sand-box of a locomotive, is a fellow-servant of a brakeman injured through his negligence in failing to fill the sand box with a sufficient quantity of sand.

CAMPBELL, J.: The evidence tends to show that the injury received by the appellee was caused by want of sand in sufficient quantity in the sand-box on the engine, but there is no evidence how it came about that the supply of sand was insufficient. Whether the engine, was furnished properly, in this respect, at the start, and had exhausted the supply, or started unfurnished

does not appear. If the latter be true, it was because of the failure of duty of that servant of the company, whose duty it was to fill the sand-box suitably; and for an injury suffered by reason of the negligence of such fellow-servant the appellee, a brakeman on the train, has no claim on the company; it not being made to appear that it was at fault as to the selection or retention of the servant, or in any other respect, as to this service. No rule of common law is more universally affirmed than non-liability of the master to one of his servants for an injury caused by the negligence of a fellow-servant engaged in the common service; and it was distinctly announced in this State, more than 16 years ago, that all employees of a railroad company, engaged in merely operative service connected with the carrying on of the business of running trains, are fellow-servants, and that the common employer is not responsible to one of these for injuries caused by the negligence of another. Undoubtedly the "hostler" or yard servant charged with the duty of supplying the engine before starting it on the road, with fuel, water, sand, or other needed thing, is a mere servant, and not the agent or representative of the master, except in that qualified and subordinate sense in which every servant may be said to be; and if it be true, which has not yet been affirmed in this State, that certain employees of a railroad company are not fellow-servants of the army of employees employed in doing the work of carrying on the business, it would yet be true that the appellee and the laborer whose default is supposed to have led to his hurt were fellow-servants, and no liability attached to the common master. The rule on this subject announced in Railroad Co. v. Hughes, 49 Miss. 258 (decided in 1873), and reaffirmed with emphasis in Howe v. Railroad Co., 50 Miss. 178 (1874), has remained undisturbed by judicial or legislative enactment, and must be regarded as the accepted doctrine in this State; and we must not be expected to follow the devious ways of those courts which, in bending the rule, which all acknowledge, to effect their ideas of justice in particular cases, have well nigh destroyed the rule itself. This rule, as held in this State, and in several other States of the United States, and in England, is a simple one, just in its principle, politic in its application, because conservative of life and property, and easily understood and applied, while all efforts to vary and qualify it have involved courts undertaking it in endless contradictions and difficulties.

The writer of this opinion was at the bar, and was sought to be employed to bring the action of Railroad Co. v. Hughes, cited above, and after careful consideration of the case, with the facts before him, declined to act as counsel, on the ground that the law was believed to be against the right to recover on those facts; which circumstance is mentioned to show that, before any announcement of the law on this subject in this State, the writer had reached the conclusion afterwards announced in the very case which had been offered him as counsel and declined. This conclusion was based on the law of master and servant as laid down in books which were accessible. The case was not tried on the principles announced in this opinion, and a new trial must be had. Reversed and remanded.

NOTE.—There are but two authorities, so far as the writer is able to discover, directly in point with the principal case. In each of them the court reached the same conclusion as the Mississippi court. In Collins v. St. Paul & S. C. R. Co.,[1] it appeared that A, who was a track repairer, was injured by a train running into a hand-car, upon which he was returning home from work. The evidence showed that the head-light of the locomotive was not lighted. The court held that the negligence was that of fellow-servants, and that the company was not liable. Chief Justice Gilfillan said: "The negligent omission to provide a head light (or lantern) upon the locomotive—it appearing that a head-light is necessary to the safe running of a train in the dark—would have been the negligence of the defendant, as between it and its servants, for which it would have been liable to them for injuries caused by it.[2] There was, however, no evidence that there was not a head-light on the locomotive; on the contrary, the evidence was full and satisfactory that it had a head-light. There was evidence enough that it was not lighted at the time. That was due to the neglect of those in charge of the train—fellow-servants of Collins—for whose negligence the defendant would not be liable to him or his representatives."[3] The other case is Pennsylvania R. Co. v. Wachter.[4] In this case it was held that where through the fault of persons in charge of a train, the head-light is exposed in front of the engine in foggy weather, as expressly required by a rule of the railroad company, whereby a track hand is injured, the company is not responsible for the negligence of such persons, unless it failed to exercise proper care in their selections, or retained them in its service with knowledge of their incompetency.

While in each of the cases above cited the injury to the railroad employee was caused by the absence of a head-light on the locomotive, and in the principal case the injury was due to want of sand in the locomotive sand-box, yet there can be no doubt that the principle involved is identical. But are they correct expositions of the law? Do they coincide with the fundamental rule which lies at the basis of the entire doctrine of co-service? That rule is this: The employer, in his personal capacity as such, assumes certain obligations and is required by the implied contract of service to perform certain duties. The person who is deputed by the employer to discharge these duties which the law imposes on him, no matter what his rank or grade, no matter by what name he may be designated, cannot be a fellow-servant of an employee injured through his neglect in this respect. He is an agent within the meaning of the rule *respondeat superior*. It would be superfluous to cite authorities to support this fundamental proposition; however, the cases cited below may be consulted to substantiate it. This rule has been reiterated again and again by many of the most able

[1] 30 Minn. 31, 8 Am. & Eng. R. Cas. 150.
[2] Drymala v. Thompson, 26 Minn. 40.
[3] Foster v. Minn. Cent. R. Co., 14 Minn. 360.
[4] 60 Md. 395, 15 Am. & Eng. R. Cas. 187.

courts of the country."[5] Chief among these contractual obligations imposed upon the employer is that of furnishing the servant for the performance of his duties, machinery, appliances, and instrumentalities adequately safe for use. It follows from this that the servants, or more properly the agents, charged with the master's duty of supplying safe instrumentalities for the use of their fellow-servants, are vice-principals, and the employer cannot escape responsibility for the results of their negligence by pleading the doctrine of co-service. It is not applicable in such case.[6]

Now, can the cases from Mississippi, Minnesota, and Maryland be harmonized with these settled rules?

In the writer's opinion they cannot, without disputing the proposition that a locomotive sand-box are "appliances and instrumentalities" which the railroad company contracts with its servants to furnish, in a condition "adequately safe." A sand-box or a head-light is as much a part of a complete locomotive as a fire-box or a boiler. True they are minor appliances, without which the locomotive would not be seriously hindered. But there is no disputing the fact that they are are recognized as essential to that completeness of detail which a railroad comyany must observe in conducting its hazardous business. This being so, what is the position of those employees whose duties are to supply the sand-box with sand, or to see that the head-light is on the locomotive, is burning at the right time; without sand, the sand-box is useless and the head-light, unless burning, subserves no purpose.

The company, then, has not performed its entire duty in placing a sand-box and a lantern on the locomotive. Appliances of adequate safety have not been supplied. Some part of the employer's duty yet remains to be done. If, then, the employee whom the company has designated to perform this final duty is derelict, it is the employer who must respond. No one will dispute the proposition that the railroad company would be responsible for an injury caused by the neglect of an employee to supply the sand-box and the lanterns in the first place. Should it not, then, in equity be equally responsible for the default of the empoyee whose duty it is to supply the sand and light the lantern? The two occupations hinge upon each other. Each is necessary to the other, and calling the first set of employess vice-principals, and the second, fellow-servants, leads to an absurdity.

It is believed that the only correct position to take in this class of cases is to consider all employees who have anything to do with furnishing, repairing or keeping in proper condition machinery and appliances, agents or vice-principals; and to hold the employer liable for their neglect in these respects.

This is certainly the only position which is warranted by the better class of cases, and sustained by fundamental principles. If there is ever to be any harmony and consistency amoung the authorities on this perplexing branch of a perplexing subject it can only be reached by consistent application of this rule.

[5] McKinney on Fellow Servants, p. 54.

[6] McKinney on Fellow Servants, p. 64; Ford v. Fitchburg R. Co., 110 Mass. 240; Ackerson v. Dennison, 117 Mass. 407; Killea v. Faxon, 125 Mass. 485; Snow v. Housatonic R. Co., 8 Allen (Mass.), 441; Hough v. Texas & Pac. R. Co., 100 U. S. 213; Davis v. Cent. Vermont R. Co., 55 Vt. 84, 11 Am. & Eng. R. Cas. 173; Noyes v. Smith, 28 Vt. 59; Cumberland, etc. R. Co. v. State, 44 Md. 283; Shanny v. Androscoggin Mills, 66 Me. 420; Bowers v. Union Pac. R. Co. (Utah), 7 Pac. Rep. 251; Cunningham v. Union Pac. R. Co. (Utah), 7 Pac. Rep. 795; Bushby v. New York L. E. & W. R. Co., 107 N. Y. 374; Booth v. Boston, etc. R. Co., 67 N. Y. 593; Stringham v. Stewart, 100 N. Y. 516; Pantzar v. Tilly Foster Min. Co., 99 N. Y. 368; Laning v. New York Cent. R. Co., 49 N. Y. 521; Brickner v. New York Cent. R. Co., 2 Lans. (N. Y.), 506; affirmed by Court of Appeals, 49 N. Y. 672; Ryan v. Fowler, 24 N. Y. 410; Atchison, etc. R. Co. v. Moore, 29 Kan. 632, 11 Am. & Eng. R. Cas. 243; Atchison, etc. R. Co. v. McKee, 37 Kan. 592; Houston, etc. R. Co. v. Marcelles, 59 Tex. 334, 12 Am. & Eng. R. Cas. 231; Houston, etc. R. Co. v. Rider, 62 Tex. 267; Mitchell v. Robinson, 80 Ind. 281, 41 Am. Rep. 812; Krueger v. Louisville, etc. R. Co., 111 Ind. 51; Sioux City & P. R. Co. v. Finlayson, 16 Neb. 272; 18 Am. & Eng. R. Cas. 77; Wells v. Coe, 9 Colo. 159; Mulvey v. Rhode Island Locomotive Works, 14 R. I. 204; Ardesco Oil Co. v. Gilson, 63 Pa. St. 146; Patterson v. Pittsburg, etc. R. Co., 76 Pa. St. 389; Philadelphia, etc. R. Co. v. Keenan, 103 Pa. St. 124; O'Donnell v. Allegheny V. R. Co., 59 Pa. St. 239; Smith v. Oxford Iron Co., 42 N. J. L. 467, 36 Am. Rep. 535; Foster v. Pusey (Del.), 14 Atl. Rep. 545; Schultz v. Chicago, etc. R. Co., 48 Wis. 375; Trask v. California R. Co., 63 Cal. 96; Hallower v. Henley, 6 Cal. 209; Peschel v. Chicago, etc. R. Co., 62 Wis. 338; Beeson v. Green Mt. G. Min. Co., 57 Cal. 20; Cowles v. Richmond, etc. R. Co., 84 N. Car. 309; 2 Am. & Eng. R. Cas. 90; Savannah, etc. R. Co. v. Goss (Ga.), 5 S. E. Rep. 777; Chicago, etc. R. Co. v. Avery, 109 Ill. 314; 17 Am. & Eng. R. Cas. 649; Chicago, etc. R. Co. v. Jackson, 55 Ill. 492; Columbus, etc. R. Co. v. Troesch, 68 Ill. 545; Memphis & C. R. Co v. Thomas, 51 Miss. 637; Kelly v. Erie Telegraph & Tel. Co., 34 Minn. 321; Gibson v. Pacific R. Co., 46 Mo. 163, 2 Am. Rep. 497; Covey v. Hannibal, etc. R. Co., 86 Mo. 635, 28 Am. & Eng. R. Cas. 382; Whalen v. Centenary Church, 62 Mo. 326; Patterson v. Wallace, 1 Macq. H. L. Cas. 748; Bartonshill Coal Co. v. Reid, 3 Macq. H. L. Cas. 266; Clarke v. Holmes, 7 H. & N. 937; Murphy v. Phillips, 35 L. T. (N. S.), 477.

JETSAM AND FLOTSAM.

LEGALITY OF BETS ON RACES.—In the case of Brennan v. Brighton Beach Racing Association, the general term of the New York Supreme Court has just decided that a person who buys a pool ticket on a race-course can enforce the contract at law.

The plaintiff in this case had bought twenty pool tickets on a certain horse, which proved to be a winner. He demanded his winnings, amounting to about $750, from the seller of the pool, who, for some reason, refused to pay. Brennan thereupon brought suit to enforce payment. In the lower court the judge dismissed the suit, on the ground that the contract being a gambling transaction was void. Against this decision the plaintiff appealed, with the result above stated.

The decision is based on the so-called Ives' pool bill, which was passed in 1887. The court says, that before that time the transaction would have been unlawful; but the law then passed, among other provisions, regulates the times and places at which pools may be sold during the racing season. From this it appears that the legislature intended to legalize such sales. "They are neither forbidden nor condemned, but they are regulated. There would have been no sense nor reason in declaring that pool-selling should be confined within the period mentioned, and to the places designated, unless it was intended to sanction the right of the association to make such sales."

We cannot agree with some of the daily papers that by this decision the court has given an effect to the law which is opposed to the intention of the legislature which passed it. Section four of the law provides for the suspension of sections 351 and 352 of the Penal

Code during the days on which racing is authorized, and, also, "that pool-selling shall be confined to the tracks where the racing takes places, and to the days of the races." At other times and places pool-selling shall be severely punished. The suspended sections of the Penal Code make it a crime to sell pools, or in any way to aid in betting, or to race a horse for money. The only reasonable interpretation of these provisions is, that, at the times and places mentioned, pool-selling is to be lawful. In the case before us the pool tickets represented a contract which is good in substance, but which the courts have refused to enforce, as being contrary to law. The legislature expressly says that at certain times and places such a contract shall no longer be contrary to law. On what ground, then, can the court refuse to enforce it? Under the law as framed it would seem that no other decision could well have been reached.—*Howard Law Review.*

POETRY OF THE LAW.

[BYRNE V. BOADLE—2 HURL. & C. 722.]

One pleasant day in one July,
As Mr. Byrne was walking by
A grocer's shop in London town,
A bar'l o'flour came tumbling down
Which struck poor Byrne plumb on the head,
And he was carried home for dead.
Long days in bed he had to lie,
Hal Lucination lingered nigh,
And much between the two was said,
Of things beneath and things o'erhead,
And first the query was begun
Of "Who struck Billy Patterson?"
As soon as Mr. Byrne was fit,
At once did he sue out his writ
Against one Boadle from whose shop,
The barrel rolled which made him drop,
Alleging that he ought to git
Two-fifty *tat* for such a *tit*.
Boadle replied in bluffing tone,
"Some negligence must first be shown."
Whereat did Baron Pollock say
That "Those who barrels store away,
Must see to it they do not roll
Upon a calm pedestrian soul;
For *prima facie* evidence
Such rolling is of negligence,
As barrels do not usually
Of their own wills go on a spree;
And it would be ridiculous
Scandalous and preposterous,
That Byrne for witnesses must go
To Boadle's shop and by them show
That Boadle's act was negligent,
The facts rebut this argument;
Res ipsae loquitur applies,
Which means, the barrel tells no lies."

—D. L. CADY.

RECENT PUBLICATIONS.

THE WESTERN LAW TIMES, Winnipeg, Manitoba. May, 1890.

We welcome this fresh legal breeze from the land of blizzards and polar waves, and trust it will be in as much demand in this region as the zephyrs which surround it at home. Though the latest and most western in location of Canadian law journals it is not in any regard behind its more aged competitors. In point of typographical appearance at least, it is more than the equal, and if we are to judge of future issues by this one it will easily "hold its own" in point of ability and legal interest.

THE MODERN LAW OF RAILWAYS, as Determined by the Courts and Statutes of England and the United States. By Charles Fisk Beach, Jr., of the New York Bar, Author of "Commentaries on the Law of Receivers," "The Law of Contributory Negligence," "Wills," etc., and Editor of the Railway and Corporation Law Journal. In two Volumes. San Francisco: Bancroft-Whitney Co., Law Publishers, Booksellers & Importers. 1890.

Our friend, Mr. Beach, the distinguished editor of the "Railway and Corporation Law Journal" ought to know something about railroads and railway law, and so, at the outset, we take it for granted that these two little "pony" volumes contain that subject, in all its ramifications and with all its limitations and distinctions. At the same time it is to be regretted that so pretentious a work and one so exhaustive in scope at least, could not have been given to the public in an apparently less condensed form, for no matter how thorough the work may be, the reader will necessarily get the impression, from the size of the volumes, that it has been abbreviated. An examination of its contents, however, will disclose the erroneous character of this impression, for it is exceptionally full and complete, and goes over considerable ground on the subject of railway law covered by no other writer. It treats in detail of the organization and management, the dissolution and reorganization of railroad companies. A considerable number of its pages is devoted to the subject of construction of railroads and therein of eminent domain. It also discusses in a lucid manner and in detail the rights, duties and liabilities of railroads as carriers of goods and passengers and has five chapters on the law, decisions and rulings on governmental control of railroads under the interstate commerce act. The work will be found invaluable to railroad lawyers, and of interest to all who desire to inform themselves on the modern law of railways.

BOOKS RECEIVED.

LAWYERS' REPORTS, ANNOTATED. BOOK VI All current cases of General Value and Importance decided in The United States, State and Territorial Courts, with full Annotation, by Robert Desty, Editor. Burdett A. Rich, Reporter. Rochester, N. Y.: The Lawyers' Co-Operative Publishing Company. 1889.

A DICTIONARY OF THE LAW, Consisting of Judicial Definitions and Explanations of Words, Phrases, and Maxims, and an Exposition of the Principles of Law: Comprising a Dictionary and Composition of American and English Jurisprudence. By William C. Anderson, of the Pittsburgh Bar. Chicago: T. H. Flood and Company, Law Publishers. 1890.

THE AMERICAN DIGEST. Annual, 1889. Being Vol. 3 of the United States Digest Third Series Annuals. A Digest of all the Decisions of the United States Supreme Court, all the United States Circuit and District Courts, the Courts of Last Resort of all the States and Territories, and the Intermediate Courts of New York State, as Reported in the National Reporter System and elsewhere during the year 1889. With a Table of Cases Digested, and a Table of Cases Overruled Criticised, Followed, Distinguished, etc., during the year. Reference to the State Reports given by an Improved Method of Topical Citation. Prepared and Edited By the Editorial Staff of the National Reporter System. St. Paul. Minn.: West Publishing Co., 1890.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION—Legatees.—Sayles, Civil St. Tex. arts. 1949-1952, which provide that creditors of an estate administered under a will without the probate court, by executors not required to give bond, may require the legatees to give bond, on which suit may be maintained for the recovery of their claims, is not exclusive of the remedy given by article 1817, under which a legatee becomes personally liable for testator's debts to the extent of debt-paying assets received from the estate.—*Kauffman v. Wooters*, Tex., 13 S. W. Rep. 549.

2. ARREST WITHOUT EXTRADITION.—When a person is arrested in a sister State, and without being extradited is forcibly brought into the jurisdiction of this State, to answer to a criminal offense, and is committed to jail to await trial on such charge: *Held*, that such person is unlawfully deprived of his liberty, and is entitled to be discharged on *habeas corpus*.—*In re Robinson*, Neb., 45 N. W. Rep. 267.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS.—A stipulation for a release in a general assignment for the benefit of creditors, which is made only as a condition of preference, does not invalidate the instrument.—*Wolf v. Gray*, Ark., 13 S. W. Rep. 512.

4. ASSIGNMENT FOR BENEFIT OF CREDITORS. — Under Mansf. Dig. Ark. § 305, the surrender of possession to an assignee under an agreement made at the time of the assignment, by delivering to him the key of the premises in which the assigned goods are stored for the purpose of making an inventory, and before the assignee has qualified by filing an inventory and giving bond, avoids the assignment. — *Gilkerson-Sloss Commission Co. v. London*, Ark , 13 S. W. Rep. 513.

5. ATTACHMENT— Priority. — Suit by attachment was brought on notes in the name of the payees, without their knowledge, by attorneys acting for their surety. The payees subsequently ratified it, but meanwhile other creditors had levied a second attachment: *Held*, that the first attachment was not the suit of the payees until their assent to it, and the lien of the second attachment was entitled to priority.—*Crauth-Brynes Hardware Co. v. Deere*, Ark., 13 S. W. Rep. 517.

6. ATTORNEY IN FACT— Conveyances. — A conveyance by an attorney in fact of land of his principal to himself, through a third person, is invalid.— *Davis v. Davis*, Mont., 23 Pac. Rep. 715.

7. CANCELLATION OF CONTRACT.— In an action to cancel two mortgages it appeared that the first was a forgery by plaintiff's son; that plaintiff gave the second to secure the forged notes, in consideration of defendant's agreement not to prosecute: *Held*, that the first would be canceled, but that as to the second plaintiff having entered into the illegal contract, and not having withdrawn from it until his son was prosecuted by other persons, equity would not interfere. — *Shattuck v. Watson*, Ark., 13 S. W. Rep. 516.

8. CARRIERS—Passengers— Negligence. — Question of negligence of railroad company where passenger was injured in falling through the open space between station platform and car.—*Ryan v. Manhattan Ry. Co.*, N Y., 23 N. E. Rep. 1131.

9. CARRIERS OF PASSENGERS — Contributory Negligence.— In an action against a railroad company for personal injuries, the evidence showed that plaintiff, a man of 65, on a dark and cold night, after waiting in the snow and becoming benumbed, attempted to board a moving train, that, with a valise in one hand, he seized the railing with the other, and attempted to leap upon the platform, but missed his footing, and was dragged 150 yards, during which time he held on to the valise: *Held*, that plaintiff was guilty of such contributory negligence that he could not recover.—*McMurtray v. Louisville, etc. Ry. Co.*, Miss., 7 South. Rep. 401.

10. CEMETERIES — Location. — Gen. St. Conn. § 2655, providing that no cemetery shall be located within one-half mile of any reservoir from which the inhabitants of any town are supplied with water, unless the superior court shall find that such cemetery is "of public convenience and necessity," and will not be detrimental to the public health, does not prohibit a religious denomination from so locating a cemetery on its own lands, for the exclusive use of its own adherents, where it appears that the cemetery as located will not be detrimental to the public health. — *In re St. Bernard & St. L. Cemetery Ass'n.*, Conn., 19 Atl. Rep. 514.

11. CONTRACT—Performance. — The contract being an undertaking to pay a definite amount of money on a certain named day, provided that by that time a specified mortgage is taken up and canceled, and the declaration alleging a performance of this condition, a failure to prove its performance before the commencement of the action entitles the defendant to a nonsuit. The condition being precedent to the right of action, its performance pending the suit will not suffice.—*Baker v. Tillman*, Ga., 11 S. E. Rep. 356.

12. CONTRACTS—Construction. — Where a contract by plaintiffs, for plastering, provides that, before payment can be demanded, plaintiffs must obtain the certificate of approval of specified architects, their failure to obtain such certificate is a defense to an action on the contract, in the absence of fraud or collusion on the part of the architects and defendant.—*Hanley v. Walker*, Mich., 45 N. W. Rep. 57.

13. CONTRACT — Joint Undertaking. — Two persons agreed to purchase logs and manufacture lumber. One was to advance the money, and the other to attend to the business. They jointly examined the timber, and the one who was to make the advances, in most instances, paid for the purchases, and for the labor of hauling and sawing. He was to reimburse himself for his advances, interest and services from the sale of the lumber, and for that purpose retained control thereof. *Held*, that the arrangement was a joint undertaking, and that a laborer employed by one was entitled to recover against both.—*Dumanoise v. Townsend*, Mich., 45 N. W. Rep. 179.

14. CONTRACT FOR LABOR. — When an oral agreement to do work and labor is loose, obscure, indefinite, and ambiguous, the intention of the parties at the time of making it must be gathered from their acts in connection with the surrounding circumstances, as well as

from their words.— *Blood v. Fargo, etc. Co.*, S. Dak., 45 N. W. Rep. 200.

15. CONTRACT — Cancellation. — A contract for the manufacture of barbed wire by plaintiff for defendant which provides that "any judicial or legal interference shall act as a cancellation of this contract, if either party so desire," is not cancelled by the mere fact that an action was brought to enjoin defendant from selling the wire, but that it was necessary for defendant to give notice of his intention to cancel it on account of such suit.— *Crescent Manuf'g Co. v. N. O. Nelson Manuf'g Co.*, Mo., 13 S. W. Rep. 503.

16. CORPORATIONS—Religious Society.—Rev. St. Ill. ch. 32, § 42, which limits the amount of land that can be held by any "corporation formed for religious purposes," does not apply to a "Young Men's Christian Association" the articles of which show it was organized as a corporation "not for pecuniary profit;" such association not being under the control of any one religious denomination, and not being formed for the purpose of religious worship.— *Hamsher v. Hamsher*, Ill., 23 N. E. Rep. 1123.

17. CORPORATIONS—Officers. — The president of a corporation, who had entire control of its business, and the disposition of its funds, accepted in the name of the corporation, a draft drawn on himself personally; making it payable at the bank wherein the corporate funds were deposited: *Held*, that his acceptance was a direction to the bank to pay the draft out of the corporate funds, and that, though the draft was in fact given on account of the president's individual transaction, the corporation, after acquiescing for nine months in its payment, was estopped from recovering the amount as against the bank. — *McLaron v. First Nat. Bank*, Wis., 45 N. W. Rep. 223.

18. CRIMINAL LAW—Bribbery.— Where a denial of the right of suffrage and to hold public office is annexed to the punishment imposed on conviction of a misdemeanor, an appeal will lie to the court of appeals, though the fine imposed is insufficient to give the court jurisdiction.—*Johnson v. Commonwealth*, Ky., 13 S. W. Rep. 520.

19. CRIMINAL LAW—Witness.— Under Rev. St. Mo. 1879, § 1907, which declares that "the provisions of law in civil cases, relative to compelling the attendance and testimony of witnesses," and their examination, "shall extend to criminal cases so far as they are in their nature applicable thereto," exceptions to the admission of testimony in a criminal case cannot be considered when the reasons for excluding it were not stated to the court with the objection. — *State v. Hope*, Mo., 13 S W. Rep. 490.

20. CRIMINAL LAW—Attempt to Provoke Assault.—Under Rev. St. Ind. 1881, § 1938, which makes it an offense to provoke, or attempt to provoke, one having the present ability so to do, to commit an assault and battery, an affidavit charging in a single count that the defendant "did provoke, and attempt to provoke," is not bad for duplicity. — *Marshall v. State*, Ind., 23 N. E. Rep. 1141.

21. CRIMINAL LAW—Perjury. — An indictment for perjury which states the substance of the proceeding in which the false testimony was given, the materiality of the testimony, the name of the officer by whom the oath was administered, and that he was authorized to administer it, the fact testified to on which perjury is assigned, and that the testimony was willfully and corruptly false, is sufficient, under Code Ala. 1885, § 3908, prescribing the requisites of an indictment for perjury.—*Barnett v. State*, Ala., 7 South. Rep. 412.

22. CRIMINAL LAW — Perjury. — On indictment for perjury on the trial of a criminal case, it is no defense that defendant was induced to testify falsely by threats against his life, made out of court, some time before the trial.—*Bain v. State*, Miss., 7 South. Rep. 408.

23. CRIMINAL LAW—Burglary.—The necessary breaking requisite in statutory burglary is accomplished when a person who has no business in a factory effects an entrance by turning the door-knob, thereby withdrawing the bolt used in the day-time to keep the door closed; the same being done early in the morning, after the door was unlocked, but before it had come into general use for the day by the public, or even by the employees of the establishment.—*Kent v. State*, Ga., 11 S. E. Rep. 355.

24. CRIMINAL PRACTICE—Larceny from Corporation.—Where property is stolen from a corporation, it is unnecessary, on trial of the thief, to introduce the articles of association or charter of the corporation. It is sufficient to prove that such a corporation in fact was in existence, and was possessed of the property stolen. —*Braithwait v. State*, Neb., 45 N. W. Rep. 247.

25. PRACTICE—Impaneling Jury.—Where the clerk of the district court, in calling names for a trial jury, did not obtain the names from any jury-box, and did not use either a jury-box or ballots in calling the jury, but called off the names of those who served as jurors from a list of names before him, *held*, it was error.—*Territory N. Dak. v. O'Hare*, N. Dak., 44 N. W Rep. 1003.

26. DECEIT.— In an action for fraudulent representations, whereby defendants obtained plaintiff's note for the price of oats at an exorbitant price in return for an agreement and bond of a fictitious corporation to sell a larger quantity for plaintiff at the same price on commission, it is error to direct judgment for defendants on the theory that the transaction was illegal, and the parties in *pari delicto*.—*Pearl v. Walter*, Mich., 45 N. W. Rep. 181.

—27. DEDICATION RIGHT OF WAY.—A will authorized the executor to sell certain lands, "with the understanding, in the sale of all the tracts, there is to be a passway, at least fifteen feet wide, near or where the present lane is, to the public road." Plaintiff and defendant each purchased part of said lands, the lane passing over defendant's tract. *Held* that, where the existing lane had been used as a matter of right, there was a sufficient dedication of the passway, and defendant could make no change in its location.—*Wickliffe v. Magruder*, Ky., 13 S. W. Rep. 523.

28. DEED—Power of Agent.—The power to sell, as distinguished from the power to convey, real estate, may (in the absence of a statute to the contrary) be conferred or subsequently modified by parol. Where the power of attorney authorizes the agent both to sell and to convey, if the agent exceeds his authority as to the terms of sale, and executes a conveyance (the power to convey being general and having no express limitation attached), the deed is not absolutely void, but merely voidable, and the sale may be ratified by the principal by parol.—*Dayton v. Nell*, Minn., 45 N. W. Rep. 231.

29. DEED—Acknowledgment. — Acknowledgment of a deed may be taken by a notary who is a nephew and attorney of a person interested in its procurement, though such relationship would disqualify him to act as judge, under Code Civil Proc. Mont. § 547.—*First Nat. Bank v. Roberts*, Mont., 23 Pac. Rep. 718.

30. DIVORCE—Alimony.—In allowing alimony, the court will consider the ability of the husband, the estate, if any, of the wife, and the situation of the parties, and will render such a decree as under the circumstances will be just and equitable.—*Small v. Small*, Neb., 45 N. W. Rep. 248.

31. ELECTION—City Councilmen.—Where a vacancy occurs in the office of councilmen in a city of the first-class less than 30 days prior to the annual city election, it can not be filled at that election.—*State v. Hamilton*, Neb., 45 N. W. Rep. 279.

32. ELECTION—Supervisors.—Construction of the U. S. Rev. St. § 2026 as to the fees of the supervisors of election.—*Walker v. U. S.*, U. S. C. C. (Mo.), 41 Fed. Rep. 672.

33. EMINENT DOMAIN.— As Code Civil Proc. Cal. § 1244, providing what the complaint in proceedings in eminent domain shall contain, does not mention value or damages, the burden of proving value is on defendant, and, where there is no direct evidence of value, a

finding for defendant is ground for a new trial.—*Monterey County v. Cushing*, Cal., 23 Pac. Rep. 700.

34. EMINENT DOMAIN—Damage to Adjoining Property.—The owner of land abutting on a street over which a railroad has been built, with the consent of the municipality, can not recover from the railroad company for loss of trade occasioned by the diversion of travel to another street on account of the presence of the railroad, since such damage is not peculiar to himself.—*Jackson v. Chicago, S. F. & C. Ry. Co.*, U. S. C. C. (Mo.), 41 Fed. Rep. 616.

35. ESTOPPEL—In Pais.—To create an equitable estoppel, the party claiming it must have done something, or in some way changed his position for the worse, in reliance upon the conduct of the other party, so that he will not be left, or cannot be put back, in his former condition, in case such other party is allowed to assert his original rights.—*Nell v. Dayton*, Minn., 45 N. W. Rep. 229.

36. EVIDENCE—Notice to Produce Writing.—Where a party to an action desires to give evidence *aliunde* of the existence of contents of a private writing which has been delivered to the adverse party, the better practice is to serve a timely notice upon such party, or his attorney, to produce the writing at the trial; but such notice may be dispensed with upon proof that such party has said that such writing has been lost or destroyed.— *Barmby v. Plummer*, Neb., 45 N. W. Rep. 277.

37. EVIDENCE—Memorandum.—In replevin for goods sold on the ground that the statement of the buyer as to his financial condition, made to a mercantile agent, on the faith of which the sale was made, was false, the agent, in testifying, may refresh his memory, as to representations of the buyer, from a copy of the statement made by him (the agent) at the time; but where he testifies that he does not remember the figures given him by the buyer, but merely that he went to him and got the statement, he cannot read the copy in evidence.—*Caldwell v. Bowen*, Mich., 45 N. W. Rep, 185.

38. EXECUTION—Levy on Realty.— When an execution is levied upon personal property which is insufficient to satisfy the writ, the officer may levy upon the real estate of the debtor even before the advertisement and sale of the former. The personalty must be first sold.—*Runge v. Brown*, Neb., 45 N. W. Rep. 271.

39. FRAUDS—Statute of—Sale of Land.—As the statute of frauds requires some memorandum of a contract for the sale of land to be in writing, signed by the party to be charged therewith, parol evidence that an agreement to sell land was part of a contract, the only part of which reduced to writing was an agreement to sell goods, is properly excluded.—*Westmoreland v. Carson*, Tex., 13 S. W. Rep. 559.

40. FRAUDULENT CONVEYANCE—Possession.—In a chattel mortgage upon stock of merchandise an agreement between the mortgagor and mortgagee that the former shall remain in possession and make sales as the agent of the latter, will not of itself render the mortgage fraudulent as to creditors.—*Lane v. Starr*, S. Dak., 45 N. W. 212.

41 FRAUDULENT CONVEYANCES—Declarations.— While the general rule is that the declarations of a party made after he has parted with his interest in the subject-matter of the litigation cannot be received to disparage the right or title of one who acquired the same in good faith before such declarations were made, yet this rule does not apply to transfers of property made for the purpose of defrauding creditors.—*Smith v. Boyer*, Neb., 45 N. W. Rep. 265.

42. FRAUDULENT CONVEYANCES.— Where a sheriff had levied certain writs of attachment upon goods of a debtor which it was claimed had been transferred to a fraudulent vendee, his interest in the goods, within the value of the property levied on, would be the amounts due upon the writs with legal costs.—*Armstrong v. Lynch*, Neb.. 45 N. W. Rep. 274.

43. FRAUDULENT CONVEYANCES.—Under the facts held that defendant's deed to his wife was without consideration, and was fraudulent as against his existing creditors.—*Hodges v. Hickey*, Miss., 7 South. Rep. 404.

44. GRAND JURY—Impaneling.—Since Acts Ala. 1886-87, pp. 151-158, § 17, providing for the organization of juries, leaves in force all former laws not in conflict therewith, and makes no provision for the organization of juries on failure of the proper officers to draw and summon them, a special grand jury, in case of such failure, may be summoned by order of the court, under Code Ala. § 4316.—*Kemp v. State*, Ala, 7 South. Rep. 413.

45. GUARDIAN AND WARD—Sale. — Gould, Dig. Ark. 134, granting jurisdiction to the probate courts in the matter of the estates of wards, gave no express authority to sell the ward's lands for his maintenance: *Held*, that the general chancery jurisdiction of the circuit court to order the sale of an infant's lands for his maintenance, on the petition of the statutory guardian, was not thereby taken away.— *Shumard v. Philips*, Ark., 13 S. W. Rep. 510.

46. HOMESTEAD—Minor Children.— The possession of the homestead by the minor children after the death of both parents can be protected from partition only through the agency of a regular guardian under the authority and permission of the probate court.—*Osborn v. Osborn*, Tex., 13 S. W. Rep. 538.

47. HOMESTEAD—Children.— The homestead of a decedent is wholly exempt from the claims of the general creditors of the estate, if a constituent of the family survives the decedent, but so much of article 2002, Rev. St. Tex., as attempts to pass the homestead of an insolvent absolutely to the widow and minor children, to the exclusion of the adult, was in violation of Const. Tex. art. 16, § 52, providing that the homestead shall descend and vest as other real property of the deceased.—*Zwernemann v. Von Rosenburg*, Tex., 13 S. W. Rep. 485.

48. HOMESTEAD—Children.— Under Const. Tex. art. 16, §§ 50, 52, a further provision in § 52, that on the owner's death his homestead "shall descend and vest in like manner as the other real property," does not subject the homestead to administration in favor of creditors, so long as it is used as such by the constituents of the owner's family. — *Childers v. Henderson*, Tex., 13 S. W. Rep. 481.

49. HUSBAND AND WIFE — Community Property. — Though Civil Code Cal. § 164, which provides that land acquired after marriage by either husband or wife is community property, unless purchased with the separate estate of either, raises a separate presumption that property conveyed to a wife after marriage is community property; yet the record of a deed conveying land to the wife for a recited consideration is notice to third persons of the extent of her claim to the property, whatever it may turn out to be, and, if she has paid for it out of her separate estate, either in whole or in part, she may hold it in the same proportion on making proof of the fact. — *Jackson v. Torrence*, Cal., 23 Pac. Rep. 695.

50. HUSBAND AND WIFE—Community Property. — Under Act Wash. T. 1879, entitled "Property Rights of Married Persons," community real estate cannot be sold to satisfy a personal judgment recovered against the husband for having, as constable, wrongfully sold property under execution. — *Brotton v. Langert*, Wash., 23 Pac. Rep. 688.

51. HUSBAND AND WIFE. — The owner of a bond executed by husband and wife for money borrowed by the wife, and used by her to build on her own land, is, on the wife's death, entitled to allowance of the claim out of her estate.—*Wilson v. Wilson*, Mich., 45 N. W. Rep. 184.

52. HUSBAND AND WIFE— Community.—Profits on investments of a wife's separate estate are community property and liable for the husband's debts; and if the profits be mixed with the wife's separate estate, in a contest between the wife and the husband's creditor, the burden is on the wife to show how much of it retained the character of separate estate, or, if any part of it has undergone mutations, to trace and identify it.—*Claflin v. Pfeifer*, Tex., 13 S. W. Rep. 483.

XUM

53. INFANCY—Judgment.— A judgment for plaintiff in an action brought by one styling herself the mother and next friend of her minor-children against the administrator of their guardian, belongs to the minors, and the mother, having no interest in it, is not a necessary party to an action to enforce it. — *Wygal v. Myers*, Tex., 13 S. W. Rep. 587.

54. INFANCY—Disabilities. — The power conferred by the Code of Mississippi on courts of chancery to remove the disabilities of minors is a special statutory power, not judicial; and a decree removing such disability is not admissible in evidence, in a suit against a minor for goods furnished her, until it is shown that the court acquired jurisdiction to render it.—*Marks v. McElroy*, Miss., 7 South. Rep. 408.

55. INSURANCE—Evidence.—In an action upon a policy of fire insurance, a contract made by the insured for the purchase of lumber to be cut in another State is inadmissible in evidence to show the market value of the dry lumber destroyed by the fire. — *Western Assur. Co. v. Studebaker Bros. Manuf'g Co.*, Ind., 23 N. E. Rep. 1138.

56. INSURANCE—Lex Loci.—Rev. St. Wis. § 1945*a*, which provides that the omission to attach to an insurance policy the application or representations of the assured shall preclude the insurance company from afterwards relying thereon, is binding on a foreign corporation insuring personal property situated in the State, though the contract of insurance is made without the State.—*Stanhilber v. Mutual Mill Ins. Co.*, Wis., 45 N. W. Rep. 221.

57. INSURANCE—Agency.—A person who is applied to for insurance in a given amount, and who obtains a policy therefor from the agents of the company to which he is a stranger, and forwards it to the applicant, is agent for the latter; but his agency terminates when he delivers the policy, and notice to him of its cancellation is not notice to the policy holder.—*East Texas Fire Ins. Co. v. Blum*, Tex., 13 S. W. Rep. 572.

58. INSURANCE — Parties. — Under Mansf. Dig. Ark. § 4933, providing that "every action must be prosecuted in the name of the real party in interest," an insurance company which has paid the insured the full value of his goods destroyed may maintain an action in its own name against the wrong-doer causing the loss.—*Marine Ins. Co. v. St. L., etc. Ry. Co.*, U. S. C. C. (Ark.), 41 Fed. Rep. 643.

59. LEGISLATURES—Length of Sessions.— Rev. St. U. S. § 1852, as amended December 23, 1880, providing that "the sessions of the legislative assemblies of the several territories, shall be limited to sixty days' duration," means sixty legislative working days, exclusive of Sundays, holidys, and days of intermediate adjournment, and not sixty consecutive days.—*Cheyney v. Smith*, Ariz., 23 Pac. Rep. 680.

60. LIFE INSURANCE. — Laws Mich. 1887, Act No. 187, § 16, provides that any contracts of insurance on lives of more than sixty five years issued by co-operative and mutual benefit associations, "organized, existing, or doing business in this State under or by virtue of" its provisions, "shall be void as to the beneficiary therein named, but the amount thereof shall be payable to the heirs of the member:" *Held*, that the law does not apply to a policy issued prior to its passage, and the heirs of the assured have no claim upon money voluntarily paid to the beneficiary of a void policy.— *Smith v. Pinch*, Mich., 45 N. W. Rep. 183.

61. LIMITATION — Pleading. — Where the facts upon which the statute of limitations is predicated do not appear in the petition, but such plea is interposed in the answer as a defense, the time when the statute began to run must be definitely stated; and the mere allegations that the action is barred is not sufficient.— *Barnes v. McMurtry*, Neb., 45 N. W. Rep. 285.

62. LIMITATION OF ACTIONS. — Where an assignee for the benefit of creditors has unlawfully paid a dividend on an unsworn claim against the insolvent, who had secretly agreed with the claimants to pay them an additional sum, the statute of limitations begins to run against the assignee's right to sue the claimants for the sum so paid at the time he paid the dividend, and is not interrupted by the fact that he notified the claimants to defend an action brought by the other creditors against himself for the dividend so unlawfully paid.—*Wynne v. Willis*, Tex., 13 S. W. Rep. 548.

63. LIMITATION OF ACTIONS—Fraud.—Where the bar of the statute of limitations is completed after the enrollment of a decree and sale of land under it, a bill to set the sale aside on the ground of fraud in the procurement of the decree must allege with precision when and how complainant came to a knowlege of the fraud, and that such a fraud was discovered within one year prior to the filing of the bill, within Code Ala. § 2630. — *Duncan v. Williams*, Ala., 7 South. Rep. 416.

64. MALICIOUS PROSECUTION—Accrual of Action.—In a case of malicious prosecution, the right of action accrues whenever the criminal prosecution is disposed of in such a manner that it cannot be revived; and the prosecutor, if he proceeds further, will be put to a new one.—*Dreyfus v. Aul*, Neb., 45 N. W. Rep. 282.

65. MANDAMUS—Corporations. — *Mandamus* will not lie to compel a corporation to allow a stockholder to make a list of the other stockholders, in order that they may be induced to join him in a suit he proposes to institute against the corporation, and to share with him the expenses of such suit. — *Appeal of Empire Pass. Ry. Co.*, Penn., 19 Atl. Rep. 629.

66. MASTER AND SERVANT—Vice-principal. — The foreman of railroad repair shops, to whom is intrusted the task of restoring wrecked trains, with the assistance of a crew of men selected from the workmen in the shops and the section hands, and who has charge of all the men engaged in restoring the train, is, when in charge of a wreck, a vice-principal, for whose negligence the railroad company is liable to a workman injured while under his orders. — *Borgman v. Omaha, etc. Ry. Co.*, U. S. C. C. (Iowa), 41 Fed. Rep. 667.

67. MASTER AND SERVANT— Fellow-servant. — A road-master in charge of a working train and a working party, with power to employ and discharge the men, is a fellow-servant of a section hand riding thereon under his direction, but not employed under the immediate eye of the road-master, and the latter cannot recover for an injury received in a collision caused by the road-master's negligence. — *Galveston, etc. Ry. Co. v. Smith*, Tex., 13 S. W. Rep. 562.

68. MASTER AND SERVANT — Defective Appliances.—A street-car driver who continues in the service after becoming aware of a defect in the platform on which he stands cannot recover for an injury sustained by a fall caused by the defect, but will be held to have assumed the increased risk.—*Rogers v. Galveston City R. Co.*, Tex., 13 S. W. Rep. 540.

69. MECHANIC'S LIENS— Subcontractors. — A subcontractor cannot file a lien upon a building which the principal contractor has agreed to build and deliver to the owner, free of all liens, since the subcontractor is bound by the original contract, and is presumed to have notice of its terms.—*Schroeder v. Galland*, Penn., 19 Atl. Rep. 632.

70. MORTGAGE—Release. — Where a note secured by deed of trust has been partially paid, and a part of the land has been released from the lien of the deed, one claiming under the *cestui que trust*, who purchased the land at a foreclosure sale, takes no title to the land so released, though without notice of the payment and release.—*Huntington v. Crafton*, Tex., 13 S. W. Rep. 542.

71. MORTGAGE — Foreclosure. — Where an action to foreclose a trust mortgage is prosecuted by and in the name of the trustees for the benefit of the beneficiaries, whosoever they may be, as Code Civil Proc. Cal. § 369, provides may be done, the beneficiaries, though not named as parties to the record, are privy, and are estopped by the decree in the absence of fraud.—*Glide v. Dwyer*, 23 Pac. Rep. 706.

72. MORTGAGES—Receivers.—Where a mining com-

pany operates its various mines under one system, and the proceeds of the ore extracted from each are used indiscriminately, for the common benefit of all, a receiver appointed on the foreclosure of mortgages covering a part only of the company's property, with power to take possession of the mortgaged premises and to carry on the mines, who is permitted by the company to take possession of its entire property, and to work all its mines, rendering them more valuable and more capable of paying creditors, cannot be considered a trespasser, and is not personally liable to a general creditor of the company for sums realized by him from a mine not covered by the mortgage.—*Staples v. May*, Cal., 23 Pac. Rep. 711.

73. MORTGAGE—Foreclosure.— Plaintiff and defendant stipulated as to what the judgment in a foreclosure suit should be. Afterwards plaintiff's attorney, in the absence of plaintiff and without his knowledge or consent, changed the stipulation by agreement with defendant and his attorney so as to make the judgment include less than it originally included. The decree, by inadvertence, was drawn according to the original stipulation: *Held*, that the judgment would not be disturbed, as the power to make such a change was not within the implied authority of an attorney. — *Trope v. Kerns*, Cal., 23 Pac. Rep. 691.

74. MORTGAGES—Statute of Limitations. — A court of equity will, without proof of actual payment, discharge from record a mortgage, barred by the statute of limitations, which was given before complainant's purchase of the land covered by it, by one who then owned an equitable interest therein, and of which complainant had no actual knowledge.—*Kingman v. Sinclair*, Mich., 45 N. W. Rep. 187.

75. MORTGAGE—Tenants in Common.— Where a mortgage is given to the mortgagees jointly, but to secure the amount of the separate indebtedness of the mortgagor to each of them, they take as tenants in common, each having an undivided interest in proportion to his claim; and therefore the fact that the mortgage is void, as to one of the mortgagees, as against creditors of the mortgagor, does not affect its validity as to the others.—*Farwell v. Warren*, Wis., 45 N. W. Rep. 217.

76. MORTGAGES—Future Advancements.—A mortgage for a specific sum given in good faith as security for future advances, is a valid security, as against the general creditors of the mortgagor, for advances not exceeding the sum specified in the mortgage.—*Louisville Banking Co. v. Leonard*, Ky., 13 S. W. Rep. 521.

77. MUNICIPAL CORPORATIONS — Contracts. — In the absence of express statutory authority, a municipal corporation cannot make a permanent and exclusive contract with a water company to build water-works and supply it with water. Such authority cannot be implied from the general power conferred by its charter to contract for the needs of the municipality. — *Greenville Water-works Co. v. City of Greenville*, Miss., 7 South. Rep. 409.

78. MUNICIPAL CORPORATIONS—Charter. — An attempt by a town of over 1,000 inhabitants, incorporated under Rev. St. Tex. tit. 17, ch. 11, to reorganize under the provisions of title 17, ch. 1, *Id.*, does not result in the surrender of its existing charter, even though all steps were taken as prescribed. — *Harness v. State*, Tex., 13 S. W. Rep. 535.

79. MUNICIPAL CORPORATION — Publication of Notices. —Neither the duty nor the power to contract for the publication of notices, claims, advertisements, proclamations, reports, or ordinances is imposed by the terms of the charters of cities of the first class upon the city, the mayor, the council, or either or any officer of the city.—*Call Pub. Co. v. City of Lincoln*, Neb., 45 N. W. Rep. 245.

80. MUNICIPAL CORPORATION—Officers.—All officers of a city are prohibited from being directly or indirectly interested in any contract or agreement to which the city, or any one for its benefit, is a party, and such contract may be avoided by the city. — *Grand Island Gas Co. v. West*, Neb., 45 N. W. Rep. 242.

81. MUTUAL BENEFIT INSURANCE.— Where neither the beneficiary of mutual benefit insurance certificates nor the trustee for the beneficiary and her husband (the beneficary's parents) could insure the life of the assured for the beneficiary's benefit, under defendant's charter, if the trustee's husband induced the assured to insure her life for the benefit of the beneficiary, and paid therefor, the certificates were void; but if they were issued to the assured on her own application, and paid for with her money, and if she died a natural death, the beneficiary can recover, unless the insurance was fraudulently procured.—*Whitmore v. Supreme Lodge*, Mo., 13 S. W. Rep. 495.

82. NEGLIGENCE—Appeal.—Where a person driving at a trot along a city street is upset by a pile of mud which the city has caused to be piled up in the middle of the street, and allowed to freeze, the questions of negligence and contributory negligence are questions of fact, on which the judgment of the appellate court of Illinois is conclusive.—*City of Champaign v. Jones*, Ill., 23 N. E. Rep. 1125.

83. NEGOTIABLE INSTRUMENTS—Bona Fide Purchasers. —In an action brought on a promissory note by an indorser against the makers, where facts were alleged in the answer showing fraud on the part of the payee in the inception of the note, and the plaintiff replied, denying such allegation, the trial court held the burden of proof to be upon the defendant, and upon the offer of proof by the defendant the plaintiff objected to any testimony on the part of the defendant because the answer admits the execution and purchase of the note, and because the facts pleaded do not constitute defense or show that plaintiff acted in bad faith in its purchase, which objection was sustained: *Held* error.—*Haggland v. Stuart*, Neb., 45 N. W. Rep. 263.

84. NEW TRIAL—Notice. — After a cause on the calendar of the district court has been tried, and a verdict rendered, if the court grants an order for a new trial, from which the adverse party appeals to the supreme court, the cause must be again noticed for trial after an affirmance of the order appealed from, and the remanding of the cause to the district court. — *Mead v. Billings*, Minn., 45 N. W. Rep. 228.

85. NUISANCE—Evidence.— A powder magazine in the neighborhood of plaintiff's residence held a nuisance.—*Comminge v. Stevenson*, Tex., 13 S. W. Rep. 556.

86. PARTNERSHIP—Administration.—A suit against the surviving partner and administrator of his deceased partner for a settlement of the partnership accounts, brought within six months after the grant of administration cannot be maintained under Code Ala. 1886, § 2263, which provides that "no suit must be commenced against an executor or administrator as such until six months, and no judgment rendered against him as such until eighteen months, after the grant of letter testamentary or of administration."— *Word v. Word*, Ala., 7 South. Rep. 412.

87. PARTNERSHIP — Powers of Partners. — Where the managing member of a mining partnership, in disregard of positive instructions from his copartners, borrows money for partnership purposes, but solely on his own credit, and without their knowledge, it is error, in an action against the partnership for the money, to instruct that the copartners are liable if the act was "necessary for carrying on the business of the partnership. —*Randall v. Meredith*, Tex., 13 S. W. Rep. 576.

88. PLEDGE—Rights of Pledgee.— Where a person, to secure a debt and further advances, pledges and assigns, among other collateral, the note of a third person, secured by a deed of trust, and the note is afterwards satisfied, the pledgee cannot apply the security of the trust-deed to satisfy any part of the pledgeor's indebtedness. — *Newman v. Bank of Greenville*, Miss., 7 South. Rep. 403.

89. PRINCIPAL AND SURETY — Limitations. — Where a surety gives his note for his contributive share to his co-surety, who has paid the debt of the principal, after the co-surety's right of action against the principal is

barred by limitation, he cannot recover the amount of the note from his principal. — *Stone v. Hammell*, Cal., 23 Pac. Rep. 703.

90. RAILROAD COMPANY—Killing Stock. — The absence of one of the hooks in a gate-post of a railroad fence, which does not prevent the fence from being securely fastened against the escape of animals, is not such a defect as will render the railroad company liable for two horses which were killed on its track, under the circumstances of this case.—*Davenport v. Chicago, etc. R. Co.*, Wis., 45 N. W. Rep. 215.

91. RAILROAD COMPANY—Fires.—An unnecessary delay of ten or fifteen minutes, by a land-owner, in making an effort to extinguish a fire set by the engine of a railroad company on its right of way, does not warrant the court in directing a verdict for defendant in an action for the loss occasioned by the spread of the fire, where there is evidence that the land-owner could not have arrested its progress had he acted with the utmost promptness.—*Mills v. Chicago, etc. Ry. Co.*, Wis., 45 N. W. Rep. 225.

92. RAILROAD COMPANIES—Use of Streets.—A statutory license to occupy the streets of a city with a line of steam-railway, which is conditional upon paying, before proceeding with the construction, damages to the owners of property injured thereby, contemplates such payment as a condition precedent; and the company may be enjoined from violating the condition. That the statute provides that either party may proceed to have the damages assessed will not make it incumbent upon the property owner to take steps for that purpose, rather than resort to the remedy of injunction.—*Georgia, etc. R. Co. v. Ray*, Ga., 11 S. E. Rep. 352.

93. RAILROAD COMPANY — Obstruction of Street. — A railroad company, contracting to remove cotton received by a compressing company, from its warehouse where it was received, to its compressing mill, is liable for damages occasioned by a nuisance resulting from the accumulation of the cotton in a public street owing to its failure to remove the same.—*Marine Ins. Co. v. St. L., etc. Ry. Co.*, U. S. C. C. (Ark.), 41 Fed. Rep. 643.

94. REMOVAL OF CAUSES. — Under Act Cong. March 3, 1887, ch. 373, § 2, an action may be removed, though by the section, requiring suits between citizens of different States to be brought in the district of the residence of either plaintiff or defendant, it could not have been originally commenced in the district; neither party being resident therein.—*Amginck v. Balderston*, U. S. C. C. (R. I.), 41 Fed. Rep. 641.

95. RES ADJUDICATA — Ejectment. — A judgment in ejectment is not a bar to another action of the same sort between the same parties litigant, for the same land, where no equitable defense was interposed in the former action, and defendants may attack an agreed statement in the former action as being equally inconclusive as the judgment based thereon. — *Sutton v. Dameron*, Mo., 13 S. W. Rep. 497.

96. SALE—Rights of Seller.—Where the seller elects to resell the goods which the buyer has refused to accept, the buyer's knowledge of the legal right to resell, resulting from his refusal to comply with the contract, is a sufficient notice to him of the intention to resell to entitle the seller to recover the damages sustained by a resale.—*Waples v. Overaker*, Tex., 13 S. W. Rep. 527.

97. SALE BY INSOLVENT DEBTOR.—A sale by an insolvent debtor to one of his creditors in consideration of his debt, and of the payment by him of debts due some of the other creditors, is valid, if the entire consideration amounts to the fair value of the goods sold, and no benefit is reserved to the debtor. — *Chipman v. Stern*, Ala., 7 South. Rep. 409.

98. TRIAL — Exceptions. — Comp. Laws N. M. § 2197, which provides that "exception to the decision of the court upon any matter of law arising during the progress of the cause, or to the giving or refusing of instructions, must be taken at the time of such decision In equity causes, no exception shall be required,"—refers to bills of exceptions in common-law causes, and not to exceptions to a master's report in equity causes. —*Newcomb v. White*, N. Mex., 23 Pac. Rep. 671.

99. TRIAL—Juror.— Where the question on motion for new trial is whether a juror declared himself in favor of one of the parties before the trial, and there is evidence to show that he did so, the affidavits of the other jurors showing that he made similar declarations in the jury-room are admissible.— *Hyman v. Eames*, U. S. C. C. (Colo.), 41 Fed. Rep. 676.

100. VENDOR AND VENDEE. — In an action for the purchase money of land, defendant's plea asked a rescission of the contract and alleged that the vendor represented a part of the land to be "good hammock land," and that the vendee, by the artifice of the vendor, was prevented from examining that portion because the approach thereto was wet, and she did not have on proper shoes, and that, therefore, she relied on the vendor's statements, which were false: *Held*, that the facts alleged, though they might not authorize rescission of the contract as a whole, would authorize an abatement as to that part of the land which the vendee was not able to examine. — *Thompson v. Boyce*, Ga., 11 S. E. Rep. 353.

101. VENDOR AND VENDEE. — In an action to foreclose a purchase-money mortgage, where a general judgment is not sought against the vendee, a plea which alleges that one of the deeds in the vendor's chain of title was a forgery, but which does not allege that the vendor warranted the land, or that there was any fraud in the transaction, or that any part of the purchase money had been paid, is properly stricken out.— *O'Neal v. Carmichael*, Ga., 11 S. E. Rep. 352.

102. VERDICT. — Verdicts are to have a reasonable intendment, and to receive a reasonable construction. A verdict is good if the title sufficiently identifies the cause in which it is rendered, and the findings of the matter submitted in issue may be ascertained and clearly understood from the wording of it. — *Kelsey v. Chicago, etc. Co.*, S. Dak., 45 N. W. Rep. 204.

103. WILL—Construction. — Where a will gives to the wife of testator all his estate, both real and personal, "during her life," with "full and ample authority to dispose of the whole as she pleases," but makes several devises of any property not alienated before her death, and which she has not by will disposed of, such devises will take effect upon any property so disposed of by her.— *McCullough's Admr. v. Anderson*, Ky., 13 S. W. Rep. 353.

104. WILL — Construction. — A testator devised his property to his wife, providing, however, that in case of her marrying, it should be divided among his children. She was empowered to act, as to the sale of his property, "as she may think best for the benefit of herself and my children:" *Held*, that the will gave her power to convey a perfect title in fee. — *Gaven v. Allen*, Mo., 13 S. W. Rep. 501.

105. WILL—Probate. — A testator devised land to his wife for twenty-one years, then to any children he might have, or, in case of the death of his children, to his wife for life, and in case no child of his survived her, then on her death to the children of M. After the probating of will, testator's widow brought suit to have it set aside. The executor and a guardian *ad litem* for testators child filed answers: *Held*, that the children of M, who had under the will a contingent remainder, were represented in the suit by the parties thereto, and, as a proceeding to vacate a will is a proceeding *in rem*, they were bound by the decree annulling the probate of the will.—*Miller v. Foster*, Tex., 13 S. W. Rep. 529.

106. WILL—Description of—Legatee.—A bequest to the "Board of Trustees of the General Convention of the Universalists in the United States of America, a corporation, their successors and assigns," is not invalidated by the fact that the corporation had changed its name to the "Universalist General Convention" before the execution of the will. — *Elnell v. Universalist General Convention*, Tex., 13 S. W. Rep. 552.